

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

ATLANTIC PINSTRIPING, LLC,)
ET AL,)
)
Plaintiffs,) No. 3:16-CV-547
)
vs.)
)
ATLANTIC PINSTRIPING)
TRIAD, LLC, ET AL,)
)
Defendants.)

)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT COURT JUDGE
SEPTEMBER 20, 2016

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LAURA MONTEMURRO - DIRECT

1 P R O C E E D I N G S

2 TUESDAY MORNING, SEPTEMBER 20, 2016

3 (Court called to order at 10:30 a.m.)

4 THE COURT: All right. We have -- we are resuming
5 the hearing in the matter of Atlantic Pinstriping and Michael
6 Montemurro versus Atlantic Pinstriping and others.

7 Is there anything further for the plaintiff?

8 MR. DeANTONIO: Yes, Your Honor. We have one
9 witness that we'd like to call for about 20 minutes.

10 THE COURT: All right.

11 MR. DeANTONIO: We'd like to call Mrs. Laura
12 Montemurro.

13 THE COURT: All right. Come forward, please, and be
14 sworn.

15 LAURA MONTEMURRO, PLAINTIFFS' WITNESS, SWORN,

16 DIRECT EXAMINATION

17 BY MR. DeANTONIO:

18 Q. Good morning, Ms. Montemurro.

19 A. Good morning.

20 Q. Could you please state your full name for the record.

21 A. Laura Montemurro.

22 Q. Ms. Montemurro, are you married to the plaintiff, Michael
23 Montemurro?

24 A. Yes, I am.

25 Q. For how long?

LAURA MONTEMURRO - DIRECT

1 A. Twenty-five years.

2 Q. Do you work for the other plaintiff, Atlantic
3 Pinstriping, LLC?

4 A. Yes.

5 Q. How long have you worked for Atlantic?

6 A. Since its inception in 2003.

7 Q. What is your title at Atlantic?

8 A. I'm a member.

9 Q. Do you have any responsibilities or duties at Atlantic?

10 A. I do not pinstripe the vehicles, but I am involved in
11 monitoring franchise reports and their 1 percent marketing
12 fund accounts and overseeing some of the supply orders as
13 well.

14 Q. Do you oversee the payment of royalties?

15 A. Yes.

16 Q. And you said marketing fund accounts?

17 A. Yes.

18 Q. And supply orders?

19 A. Yes.

20 Q. I want to touch on just a few of the issues that were
21 discussed at the first hearing in this matter. Were you here
22 for the first hearing in this matter?

23 A. Yes.

24 Q. And did you see the testimony of Mr. Montemurro?

25 A. Yes.

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1 Q. Do you recall there was some testimony about how many of
2 the pinstriping applicators and head attachments were actually
3 leased to the defendants?

4 A. Yes.

5 Q. I'd like to nail down that number. How many pinstriping
6 heads accompany each applicator?

7 A. Eight.

8 Q. Okay. And just so we can understand what we're talking
9 about, is the head an attachment that goes on to the tool?

10 A. Yes.

11 Q. And does it have a wheel that applies the paint to the
12 vehicle?

13 A. Yes.

14 Q. Okay. How do you know that eight heads accompany each
15 tool?

16 A. Every -- every tool has eight heads that would go with
17 it. Each franchisee per tool is given eight heads.

18 Q. Okay.

19 A. Per the lease.

20 Q. Okay. Are you aware of -- or have you witnessed the
21 tools and the heads being provided to other franchisees?

22 A. Yes.

23 Q. And is it always eight heads?

24 A. Yes.

25 Q. Ms. Montemurro, I'm going to ask you to look at a

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1 document.

2 MR. DeANTONIO: Your Honor, may I approach the
3 witness?

4 THE COURT: You may.

5 Q. What I've done hopefully to speed things up today is I
6 have compiled all the documents that were introduced at the
7 last hearing and put exhibit numbers on them for ease of
8 reference. So I'm going to hand you just a stack of those
9 exhibits.

10 So I'd like you to please look at Exhibit 2,
11 Ms. Montemurro. Is this the equipment lease for the Colombia
12 franchise?

13 A. I believe so.

14 Q. Okay. And if you look at the last page of this exhibit,
15 there is a list of equipment that was leased to the franchisee
16 pursuant to this agreement; is that right?

17 A. Yes.

18 Q. Does this reflect that eight heads were attached or given
19 or provided along with each tool?

20 A. Yes.

21 Q. How many tools and how many heads were provided to the
22 defendants in this case?

23 A. Two tools each with eight heads. So 2 tools and 16
24 heads.

25 Q. And that would be under the Columbia lease, right?

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1 A. Yes, I believe so.

2 Q. So for all three franchises, Columbia, Coastal and
3 Charleston, how many tools and how many heads?

4 A. I believe they had -- they had two for each. At
5 Charleston they were given one and then -- at two separate
6 times. So they had 6 -- 6 tools and would be 8 tools -- 8
7 heads per each tool, so 48.

8 Q. So I'm trying to determine not how many tools the
9 franchisees have now but total provided over the course of the
10 franchise agreements.

11 A. Over the course of the franchise between Triad Columbia,
12 Charleston, and Dealer Services Coastal, it would have been 10
13 tools --

14 Q. Okay.

15 A. -- and 80 heads.

16 Q. Ten tools and 80 heads.

17 A. Yes.

18 Q. Were any of those tools and heads returned?

19 A. Yes.

20 Q. And --

21 A. The Coastal ones, there were 2 tools and 16 heads were
22 returned.

23 Q. Okay. And so those were returned several years ago?

24 A. No, they were returned this year.

25 Q. They were returned this year?

LAURA MONTEMURRO - DIRECT

1 A. Yes.

2 Q. And when this year?

3 A. I believe in March.

4 Q. Okay. So before this dispute happened -- or before this
5 lawsuit was filed at least, the Coastal franchisee returned 2
6 tools and 16 heads; is that right?

7 A. Yes, uh-huh.

8 Q. And the deposit that they paid for those tools and heads
9 was never cashed by Atlantic, was it?

10 A. For Coastal, yes, it was.

11 Q. Okay. Was the money returned, then?

12 A. It was not because there was another check for tool
13 deposits that had not been cashed.

14 Q. In other words, the amount equal the deposit had not been
15 cashed by Atlantic?

16 A. Correct.

17 Q. So you just gave the check back?

18 A. I gave them a copy.

19 Q. And so that left the franchisees with 8 tools and 64
20 heads; is that correct?

21 A. Yes.

22 Q. Did Mr. Montemurro recover one of those tools?

23 A. Yes.

24 Q. And so did he recover three of those heads?

25 A. Yes, only three of the heads.

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1 Q. And so how many tools and how many heads remain
2 outstanding?

3 A. He should have 7 tools, and I'm trying to do math in my
4 head. Seven tools, it would -- that would have been 56 heads
5 and they returned 3.

6 Q. Okay. So 8 times 8 is 64, right?

7 A. Correct.

8 Q. And then --

9 A. Sixty-one. They should have 61 heads, then, because they
10 only returned 3 from that one -- we only recovered 3 from that
11 one tool.

12 Q. Okay. Thank you.

13 Do you recall at the last hearing that Mr. Montemurro was
14 questioned about whether or not Atlantic filled a paint order
15 that the defendants had requested?

16 A. Yes.

17 Q. And do you recall there was some testimony about one
18 large order was filled and then two subsequent orders were not
19 filled?

20 A. Yes.

21 Q. I'd like to ask you some questions about that initial
22 large order.

23 MR. DeANTONIO: May I approach, Your Honor?

24 THE COURT: You may. You need not ask further
25 permission if you need to approach the witness.

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1 MR. DeANTONIO: Thank you.

2 Q. Ms. Montemurro, is Exhibit 102 that initial large paint
3 request that the defendants made?

4 A. Yes.

5 Q. And looking at the numbers here, the quantities, do the
6 quantities reflect quarts of paint?

7 A. Yes, they're quarts.

8 Q. And I've added this up, and would you agree that this
9 equals 34 quarts?

10 A. Yes.

11 Q. Do you have an understanding of how many cars could be
12 striped with 34 quarts of paint?

13 A. Yes.

14 Q. And how many is that?

15 A. Approximately 38,000 vehicles.

16 Q. Okay. And let's just quickly run through how you get
17 there. You take the number of cubic centimeters that are in a
18 quart, and that's about 946, right?

19 A. Correct.

20 Q. And then you take the total number of cubic centimeters
21 in 34 quarts and you can determine that 10 cubic centimeters
22 is one -- can fit in one tool; is that correct?

23 A. That's right.

24 MR. HENRIQUES: I'm going to object to the leading,
25 Your Honor.

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1 THE COURT: Overruled. Let's move on, please.

2 Q. And one tool can stripe 12 cars.

3 A. Approximately, yes.

4 Q. And that's how you do the math to get to the number of
5 over 38,000 cars; is that right?

6 A. Yes, that's correct.

7 Q. What if paint thinner or hardener were added?

8 A. You could probably get more vehicles out of that.

9 Q. Did the defendants in this case ever order paint thinner
10 or hardener?

11 A. Not directly from us but from the supplier, yes.

12 Q. Is that a common practice for Atlantic franchisees?

13 A. Normally they order through us.

14 Q. Okay. To use hardener or paint thinner --

15 A. Oh, yes.

16 Q. -- is that a common practice?

17 A. Yes.

18 Q. Do you have any idea of how much paint that was compared
19 to the volume that the defendants were producing over the
20 previous year?

21 A. That's an enormous amount of paint.

22 Q. Okay.

23 A. It's an extremely large order of paint for that.

24 Q. And how long could that paint last?

25 A. At least a year and a half.

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1 Q. Okay. But Atlantic filled this order; is that correct?

2 A. Yes.

3 Q. And this order was requested in February of 2016; is that
4 right?

5 A. Yes.

6 Q. So between February 3rd, 2016, and when this lawsuit was
7 filed in June of 2016, that's when the subsequent paint orders
8 were requested by the defendants; is that right?

9 A. Yes.

10 Q. And did --

11 THE COURT: I want to interrupt. When you say that
12 would last about a year, year and a half, are you talking
13 about paint life or the amount of time it would take to use it
14 up?

15 THE WITNESS: The amount of time it would take to
16 use it to pin stripe.

17 THE COURT: Okay. Thank you.

18 Q. And why did -- what did Atlantic do when it received
19 further paint orders in the four months after this request?

20 A. This kind of sent a red flag and we were wondering why
21 such a large order had been placed. It's not in the norm for
22 any of our franchisees or even for us to have ordered that
23 amount of paint. So it was something that we were concerned
24 about.

25 Q. And so what did you do when you received the next order

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1 of paint?

2 A. We did not fill it. We did express to Ernie, Ernie
3 Horne, that this was a really large order of paint and
4 expressed that it sent a red flag to us.

5 Q. And did you request to see an inventory of what they had
6 before you would fill further orders?

7 A. Yes, we did.

8 Q. And was the -- did the franchise ultimately get
9 terminated right after -- right as this was going on?

10 A. They were terminated after we tried to do an inspection
11 and inventory, yes.

12 Q. Okay. Ms. Montemurro, are you aware that Section 16.06
13 of the franchise agreement requires that upon termination, the
14 franchisee "transfer and assign to us or our designee all
15 telephone numbers"?

16 A. Yes.

17 Q. What is the purpose behind that requirement?

18 A. The purpose would be that these numbers are advertised on
19 our website and they -- a customer would call that number
20 expecting to speak to an Atlantic Pinstriping franchisee. And
21 this would have -- be able to have some control over what
22 would be expected by our customers on that end.

23 Q. Would there be any harm to Atlantic if the clients
24 continued to associate those numbers with Atlantic?

25 A. Yes, because the customers would be thinking that they

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1 would be dealing with an Atlantic Pinstriping franchisee and
2 there would be some confusion as to who they are dealing with.

3 Q. Okay. Thank you. I'm going to hand you two documents,
4 Ms. Montemurro, Exhibits 103 and 104.

5 Ms. Montemurro, do you recognize Exhibit 103?

6 A. Yes.

7 Q. What is Exhibit 103?

8 A. They are business cards for the Atlantic franchisee, the
9 defendants' employees.

10 Q. Okay.

11 A. One is a former employee, one is a current.

12 Q. And do these business cards each have phone numbers on
13 them?

14 A. Yes.

15 Q. Have those phone numbers been returned to Atlantic?

16 A. No, they have not.

17 Q. Let's compare this document to Exhibit 104 which is a
18 declaration that was submitted last night. I'd like to ask
19 you to please look at the top of page 2 of this declaration.
20 And do you see where that paragraph states that an individual
21 named Shawnnah Blake called Lugoff Toyota and --

22 THE COURT: Look, I can read. Come on. Move on.

23 MR. DeANTONIO: Okay.

24 Q. Was one of these phone numbers in the business card
25 provided to you by the manager of Lugoff Toyota?

LAURA MONTEMURRO - DIRECT

1 A. I believe so. I mean --

2 Q. Or to Ms. Blake. Is that what Ms. Blake is saying?

3 A. Ms. Blake, yes.

4 Q. And that's the same phone number that was listed here for
5 Mark Parker; is that correct?

6 A. Yes. But I believe Matt Bernard is the one who is using
7 that.

8 Q. So a different employee of the defendants' is now using
9 this number.

10 A. Yes. Because Mark Parker no longer works for them.

11 Q. And according to Ms. Blake, this number was described as
12 being -- belonging to somebody with Atlantic Dealer Services,
13 correct?

14 MR. HENRIQUES: I'm going to object to his testimony
15 about the characterization of the affidavit which
16 characterizes the testimony of a third party.

17 THE COURT: I will -- sustained. Let's move on,
18 please.

19 MR. DeANTONIO: Okay.

20 Q. Looking at the second telephone number -- well, let's
21 just move on.

22 Ms. Montemurro, you are aware that the franchise
23 agreements and owner's agreements have a 25-mile radius
24 surrounding each franchisee's territory as part of the
25 covenant not to compete; is that correct?

LAURA MONTEMURRO - DIRECT

1 A. Yes.

2 Q. I want to ask you about that radius. Do Atlantic
3 franchisees ever serve customers who live outside their
4 territory?

5 A. Yes.

6 Q. And could you explain how that happens.

7 A. There may be a dealership that's close to the territory
8 that has a customer that wants a hand painted pinstriping so
9 there will be a little bit of overlap where they may need to
10 go outside their territory to service that customer.

11 Q. And have you ever received phone calls --

12 A. Yes.

13 Q. -- when that situation happens?

14 A. Requesting -- yes.

15 Q. And what do you do when you receive those phone calls?

16 A. I would either give the dealership or the customer the
17 phone number of the franchisees that would be closest to that
18 area or I would take their information and provide it to the
19 franchisee to contact them directly.

20 Q. Okay. Do the franchisees ever request permission to
21 serve customers outside of their territory?

22 A. Yes.

23 Q. And does Atlantic ever grant those requests?

24 A. Yes, often.

25 Q. Has Atlantic ever granted those requests for the

LAURA MONTEMURRO - CROSS

1 defendants in this case?

2 A. Yes.

3 Q. Were the defendants in this case given the opportunity to
4 expand their territory to Savannah, Georgia?

5 A. Yes, they were.

6 Q. How close is Savannah, Georgia, to the defendants'
7 territory as it was at the time of termination?

8 A. They were operating in Charleston and they had approval
9 for Hilton Head. So I think Savannah is within 25 miles of
10 Hilton Head.

11 Q. Okay. With the expansion territories, that does not
12 include permission to start a franchise, does it?

13 A. No, it does not.

14 Q. And so what does that involve? What is the permission
15 that's granted?

16 A. To service -- they would fill out an approval form,
17 request form to service for specific reasons for specific
18 dealerships.

19 MR. DeANTONIO: Okay. Thank you.

20 (Plaintiffs counsel conferred.)

21 MR. DeANTONIO: No further questions, Your Honor.

22 THE COURT: Cross exam.

23 MR. HENRIQUES: Yes, Your Honor.

24 CROSS EXAMINATION

25 BY MR. HENRIQUES:

LAURA MONTEMURRO - CROSS

1 Q. Were the franchises involved here, the Charleston,
2 Columbia, and Coastal franchises, some of the most successful
3 franchises for Atlantic Pinstriping?

4 A. In terms of the dollar amount?

5 Q. In terms of dollars.

6 A. Dollars, yes.

7 Q. And were the franchises regularly recognized at company
8 events like the Christmas party for being high performing
9 franchises?

10 A. In the dollar amount, yes.

11 Q. All right. You testified about these business cards,
12 Exhibit 103.

13 A. Uh-huh.

14 Q. No one gave these business cards to you, right?

15 A. They were proofs that were in emails from Mike through
16 Tony, yes.

17 Q. Okay. Where did these come from? Do you have any
18 personal knowledge about where the two business cards in
19 Exhibit 103 came from?

20 A. Yes. They were proofs that we had designed the business
21 cards for Tony that were emailed to Tony.

22 Q. Okay. So these were business cards that were designed
23 back when the franchise was in operation. So these are
24 business card proofs. You had designed business cards for
25 these employees.

LAURA MONTEMURRO - CROSS

1 A. And then Tony would have ordered them through probably --

2 Q. You don't know if anyone is using these business cards

3 now, right?

4 A. I'm sure they are.

5 Q. Okay. You have no personal knowledge that anyone is

6 using these business cards.

7 A. No, but I do know that they are using those phone

8 numbers, yes.

9 Q. Okay. And you have -- you have knowledge that they are

10 using these phone numbers now. What personal knowledge do you

11 have that they're using these phone numbers?

12 A. If you call the number, Brian Guggenbiller would answer

13 that.

14 Q. Right. This is actually Brian Guggenbiller's personal

15 cell phone number, right? Isn't that that number, (843)412 --

16 A. That would be the number that is for Atlantic

17 Pinstriping, yes, sir

18 Q. Do you know whether that's Brian Guggenbiller's personal

19 cell phone number?

20 A. I do not know if it's personal. It's the one that he

21 uses to represent himself as a pinstriper.

22 Q. Okay. You testified there was some potential confusion

23 because the phone numbers were advertised on the website.

24 A. Well, Tony's main -- Tony's number was, yes.

25 Q. Okay. Tony's number is advertised on the Atlantic

LAURA MONTEMURRO - CROSS

1 Pinstripe website. Is that the --

2 A. It was.

3 Q. -- website you're talking about?

4 A. It was.

5 Q. Okay. When was that number taken down?

6 A. Post-termination.

7 Q. So after termination you removed that number. So no one
8 now -- if you go to your website now, you would not find
9 Tony's phone number on the Atlantic Pinstriping --

10 A. You would not find it. You would find the local
11 Charlotte number as well as the (800) number.

12 Q. And there was no advertising like yellow pages or
13 anything else for the defendant franchises, were there?

14 A. I do not know that answer.

15 Q. Now, have you reviewed the -- you testified about the
16 equipment. Have you reviewed each of the lease agreements
17 that are involved for these franchises?

18 A. Not recently.

19 Q. Do you know how many applicators are listed in the lease
20 agreement for the Charleston franchise?

21 A. Do you want me to take a look at it?

22 Q. I'm just asking you if you know how many were listed
23 there.

24 A. I would have to look at the documents to be accurate.

25 Q. All right. And do you know how many are listed for

LAURA MONTEMURRO - CROSS

1 Coastal?

2 A. There were two.

3 Q. So you believe there was a lease agreement with Coastal
4 that listed two applicators?

5 A. Yes, there were.

6 Q. Did you personally deliver any applicators or heads to
7 the defendants in this case?

8 A. I was in the office when Tony picked up the -- came in
9 and signed the agreements for the tool -- leases for Coastal.

10 Q. Okay. So you were in the office when Tony signed
11 agreements for Coastal.

12 A. Yes, sir.

13 Q. All right. And how many -- did you see how many
14 applicators he picked up at that time?

15 A. I don't recall if he picked them up that day. There --
16 but there would have been two applicators and eight heads each
17 tool.

18 Q. And are you the person that counts out those heads?

19 A. No.

20 Q. So how do you know eight heads were delivered?

21 A. There are always eight heads that are delivered.

22 Q. I'm asking specifically for the heads delivered to these
23 defendants. Do you have any knowledge of how many heads these
24 defendants received? Or is your testimony simply that's the
25 normal procedure is everybody gets eight?

LAURA MONTEMURRO - CROSS

1 A. That is the absolute procedure that we do with every
2 franchisee.

3 Q. You testified in connection with the paint that you made
4 a request to see their paint inventory; is that right?

5 A. We asked -- I specifically asked him what he had in terms
6 of inventory for all of his locations, yes, I did.

7 Q. Right. You asked that to Tony.

8 A. Yes.

9 Q. In an email.

10 A. Yes, sir.

11 Q. And he provided you an email response back that listed
12 the current inventory?

13 A. Some -- some of it, yes. Specifically addressing
14 Florida, he did not respond to me regarding that.

15 Q. But you asked for an inventory. He emailed you an
16 inventory, but you still declined to ship any additional
17 paint.

18 A. That's not correct.

19 Q. Did you ship any additional paint after he provided an
20 inventory?

21 A. No, we did not.

22 (Defense counsel conferred.)

23 MR. HENRIQUES: Those are all I have, Your Honor.

24 THE COURT: Redirect.

25 (Plaintiffs' counsel conferred.)

JERRY PARKER - DIRECT

1 MR. DeANTONIO: No, Your Honor.

2 THE COURT: All right. You may step down.

3 THE WITNESS: Thank you.

4 (Witness stepped down.)

5 THE COURT: Anything further for the plaintiff?

6 MR. DeANTONIO: Nothing from the plaintiff at this
7 time, Your Honor.

8 THE COURT: All right. Mr. Henriques, do you have
9 any evidence you want to put on?

10 MR. HENRIQUES: Yes, Your Honor. We would call
11 Jerry Parker.

12 THE COURT: Come forward and be sworn, Mr. Parker.

13 JERRY WAYNE PAKER, DEFENSE WITNESS, SWORN,

14 DIRECT EXAMINATION

15 BY MR. HENRIQUES:

16 Q. Good morning, Mr. Parker.

17 A. Good morning.

18 Q. Could you please state your full name for the record.

19 A. Jerry Wayne Parker.

20 Q. All right. Could you tell us a little bit about
21 yourself, Mr. Parker.

22 A. Well, when I retired several years ago, I met both Tony
23 and Ernie at the golf course and worked there for a while.
24 And then they shared with me what they were doing with
25 pinstriping and at some point asked me to join them. I tried,

JERRY PARKER - DIRECT

1 and essentially you couldn't buy into a franchise. You had
2 to -- wouldn't do that, but essentially said you can buy
3 into -- you can be a part of the next franchise so...

4 Q. And what did you do before you retired?

5 A. Operated my own business for 25 years, commercial
6 cleaning and building services business.

7 Q. I want to talk more about your ultimately signing the
8 franchise agreement. I know there have been some questions
9 raised about service of process. Were you ever served with
10 process in this lawsuit?

11 A. No.

12 Q. Okay. Did you actually authorize me to accept service on
13 your behalf?

14 A. I did.

15 Q. Did you do anything to evade service of process?

16 A. No.

17 Q. You just weren't home when the package came?

18 A. Well, I don't have any territory in Indian land so I was
19 always working somewhere else.

20 Q. So is it correct, did I hear you say that you started
21 working with Tony and folks before you signed the first
22 franchise agreement on Coastal?

23 A. Yes.

24 Q. Okay. Had you talked to Mr. Montemurro about becoming a
25 franchisee?

JERRY PARKER - DIRECT

1 A. Yes.

2 Q. Tell us about those conversations.

3 A. Well, essentially we talked about what it would take to
4 do that. When we talked about trying to buy into the two
5 franchises that they already owned, Mike said, You can't be a
6 part of that. Or you can be a part of the LLC that runs it.
7 But in looking at the book for what you have and can't -- can
8 and can't do, I couldn't invest in an LLC that I couldn't get
9 anything from. Essentially, if anything happened to either
10 one of them, I'd have been out in the cold.

11 So the next solution Mike offered was next one y'all buy,
12 you can be a part of that.

13 Q. And did you specifically suggest that perhaps the
14 company, the LLC, Atlantic Triad -- sorry, Atlantic
15 Pinstriping Triad, LLC, could be named as the franchisee?

16 A. Yes.

17 Q. And that's what you wanted to protect your investment?

18 A. Correct.

19 Q. And Mr. Montemurro said that was not an option?

20 A. Correct.

21 Q. He specifically said he did not want any LLC as the
22 franchisee.

23 A. Right. It would have to be the individuals. He was not
24 going to change the -- either of the two that they already
25 had.

JERRY PARKER - DIRECT

1 Q. Okay. So how was it that you ended up becoming a
2 franchisee?

3 A. Well, we had -- Ron owned the Myrtle Beach/Wilmington
4 territory and wasn't working it. Matter of fact, Mike
5 suggested that we buy it. And we wound up doing that in
6 January of '15, I think it was.

7 Q. All right. And what was your financial contribution to
8 the Coastal franchise?

9 A. A third.

10 Q. Okay. And are you personally a franchisee under that
11 Coastal franchise agreement?

12 A. No -- I mean yes, I'm sorry. Yeah. As -- there's three
13 of us.

14 Q. All right. And who are the three franchisees for
15 Coastal?

16 A. Myself, Tony, and Ernie.

17 Q. Is there any company that is the Coastal franchisee?

18 A. No.

19 Q. Did any company sign on that -- sign the franchise
20 agreement?

21 A. No.

22 Q. Was window tinting part of the franchise agreement that
23 Coastal signed in 2015?

24 A. No.

25 Q. Did the -- did you perform window tinting services with

JERRY PARKER - DIRECT

1 customers of the Coastal franchise?

2 A. Not until November of last year.

3 Q. Okay. November 2015?

4 A. Yes.

5 Q. Did Mr. Montemurro indicate he wanted to receive
6 royalties on window tinting?

7 A. Yes.

8 Q. What royalties was he demanding on window tinting
9 services?

10 A. 7 percent.

11 Q. Was there any amendment to the franchise agreement to
12 bring window tinting services under that?

13 A. No.

14 Q. Was there ever any written agreement specifying what
15 percentage of amounts would be paid for window tinting
16 services?

17 A. No.

18 Q. There's been some discussion about a lawsuit filed by
19 Dentworks in South Carolina. Are you familiar with that
20 lawsuit?

21 A. I am.

22 Q. Are you actually named as a defendant in that lawsuit?

23 A. Yes.

24 Q. Did you have a meeting with Mike Montemurro in April to
25 discuss the Dentworks situation?

JERRY PARKER - DIRECT

1 A. I think that was it, in April.

2 Q. Tell us about that meeting with Mr. Montemurro.

3 A. We had had several. The last one was at the end of the
4 week and said that if -- if Joey is owed money, pay him. If
5 not, show me that it's not owed. That was either Thursday or
6 Friday.

7 And I said be happy to put all -- you know, get all that
8 information for you. Come down the first part of the week,
9 Monday, Tuesday, whatever is, you know, available to you,
10 which you prefer, and we'll have it ready.

11 Went down on Monday and Ernie was there and so was Tony,
12 and we had it in the office all -- every invoice, every
13 receipt, the whole nine yards, exactly what it was.

14 And Mike came in on Tuesday. He walked in and I said,
15 Okay, here it is.

16 And he says, I don't need to see that. He just took a
17 picture of it and went in a different direction.

18 Q. Okay. Now, I want to be clear. Who did Dentworks
19 actually have an agreement with to perform some dent removal
20 and other body work?

21 A. My understanding is Partners.

22 Q. Partners. Another company called Partners?

23 A. Uh-huh.

24 Q. And are you an owner in Partners?

25 A. No.

JERRY PARKER - DIRECT

1 Q. Did Dentworks have any agreement with you personally --

2 A. No.

3 Q. -- to do any dent removal?

4 Did Dentworks have any agreement with the Atlantic Dealer
5 Services to do dent removal?

6 A. No.

7 Q. So what were the documentation that was pulled together
8 to demonstrate that no money was owed to Dentworks? What did
9 that consist of?

10 A. Essentially it was the invoices that were submitted by
11 Dentworks to Partners and the -- all the statements that went
12 to the customer, all of the receipts and exactly what was done
13 and exactly what was paid.

14 Q. Okay. So you were showing -- you assembled the paperwork
15 to show that Dentworks had been paid all the money they were
16 owed from Partners.

17 A. That's correct.

18 Q. But Mr. Montemurro didn't want to see that.

19 A. Correct.

20 Q. And was a lawsuit actually filed by Dentworks?

21 A. I think -- yes, I think so.

22 Q. Did Mr. Montemurro know about that lawsuit?

23 A. I think so.

24 Q. Did he indicate he had, in fact, met with Joey Williams
25 who is the principal of Dentworks?

JERRY PARKER - DIRECT

1 A. Yes. He -- on that day I think he said he saw him either
2 that day or yesterday -- the day before.

3 Q. Were you present when Mr. Montemurro came to the
4 Charleston office on June 14th of 2016, the date of
5 termination?

6 A. Yes.

7 Q. Tell us about what happened that day when Mr. Montemurro
8 came.

9 A. He asked us to bring all of our vehicles in and he wanted
10 to do an inspection of the vehicles and the tools. And it was
11 set up for noon and we were there ready and --

12 Q. Did he bring anybody with him?

13 A. No. Well, I mean, not his people. He had two policemen
14 join him.

15 Q. So two policemen showed up along with Mr. Montemurro.

16 A. Correct.

17 Q. And what happened after he arrived?

18 A. He asked -- Matt, one of our pinstripers, drove in and he
19 was the first one to come in. And he gave -- as soon as he
20 got there, he gave the keys to Tony. And Mike asked -- went
21 over and asked Matt to open the truck. He said, I don't have
22 the keys. I gave them to Tony.

23 And he says, Okay. Can you open the truck. And he asked
24 him what for. So I can do an inspection.

25 So Tony went over and opened the truck, pulled the

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1 toolbox out, opened the toolbox. And as soon as he got the
2 toolbox open, Mike reached in and grabbed the tool and head.
3 And Tony closed it back up and says, We're through here.

4 Mike asked the policeman, Can you you make him -- would
5 you tell him to let me have my stuff.

6 The policeman says, I can't do that. That's his vehicle.

7 So he said okay and he went and pulled out a letter and
8 gave it to each one of us and says, you know, This is what you
9 get for that.

10 Q. So he delivered the letter after he repossessed the tool?

11 A. Correct.

12 Q. Did you ever get a deposit back for the tool he
13 repossessed?

14 A. Not that I know of.

15 Q. Let's look at the letter.

16 MR. HENRIQUES: And Your Honor, I put the exhibits
17 we intend to use into a notebook that we'll try to go through.

18 Q. Would you look at Exhibit 1 in that notebook.

19 Is this the letter that was delivered to you on June 14,
20 2016?

21 A. Correct.

22 Q. Was this the first notice that you received of any
23 default by the Coastal franchise?

24 A. Correct.

25 Q. And that's the only franchise you're a member of, right,

JERRY PARKER - DIRECT

1 is the Coastal franchise?

2 A. Correct.

3 Q. All right. I want to ask about some of the specific
4 claims of default that are set forth in Exhibit 1. The first
5 one appears at the bottom of page 1, that last paragraph. And
6 it says, "APS," which is Atlantic Pinstriping, "has received
7 credible evidence that you are unable to pay your debts as
8 they become due."

9 First, let me ask you individually, do you have any debts
10 or obligations that you were unable to pay?

11 A. No.

12 Q. Let me ask about the Coastal franchise. Did it have any
13 debts or obligations that it was unable to pay?

14 A. No.

15 Q. Did the Coastal franchise own trucks?

16 A. I don't think so. I don't --

17 Q. Was the Coastal franchise behind or defunct on any debts
18 that it owed when you received this notice of termination on
19 June 13 -- June 14, 2016?

20 A. None that I know of.

21 Q. When you had met with Mr. Montemurro in April, had he
22 raised any concern that the Coastal franchise was unable to
23 pay its debts?

24 A. No.

25 Q. Had he ever raised that concern to you at any of the

JERRY PARKER - DIRECT

1 meetings you had had leading up to June 14th?

2 A. No.

3 Q. All right. Then let's turn the page and look at some of
4 the other alleged defaults that Coastal committed under the
5 franchise agreement. The first one says, "Using the System
6 and/or Marks in connection with other businesses and business
7 activities."

8 Had Coastal ever used the system or marks in connection
9 with other activities?

10 A. No.

11 Q. The next says, "Using the System and/or Marks outside of
12 territories covered by the franchise agreements."

13 I understand Coastal had gotten approval to do work in
14 other franchises. Other than the approvals given to it by
15 Atlantic Pinstriping, had it ever used the services or marks
16 outside the territories?

17 A. No.

18 Q. The third one says, "Failing to comply with APS System
19 Standards."

20 Do you know what that's referring to?

21 A. No.

22 Q. Okay. Were you ever told that the Coastal franchise had
23 failed to comply with the APS system standards?

24 A. Not that I recall.

25 Q. And did you have a lawyer write a response to this

JERRY PARKER - DIRECT

1 termination letter a couple days later?

2 A. Yes, we did.

3 Q. Who was that lawyer? Is that Brandon --

4 A. Brandon.

5 Q. -- Shelburn (phonetic)?

6 Is Brandon Shelburn a lawyer in South Carolina?

7 A. Correct.

8 Q. Did he ask for details about what Atlantic Pinstriping
9 actually meant by deficiencies with system standards and the
10 other alleged defaults?

11 A. Yes.

12 Q. Were any details ever provided for how the Coastal
13 franchise had somehow failed to comply with the standards?

14 A. Not that I received.

15 Q. So you've never been told how the Coastal franchise
16 failed to comply with APS systems.

17 A. That's correct.

18 Q. The next one says, "Failed to operate the franchise
19 diligently in a manner consistent with sound business
20 practices."

21 Had Coastal been operated diligently and consistent with
22 sound business practices?

23 A. Correct.

24 Q. The next says, "Failing to maintain working capital and
25 net worth sufficient to fulfill responsibilities."

JERRY PARKER - DIRECT

1 Did you have adequate capital and net worth to fulfill
2 the operations?

3 A. Correct.

4 Q. Did you ever provide any personal financial statements
5 showing what your net worth was to Atlantic Pinstriping?

6 A. No.

7 Q. And they never asked for any of your financial
8 information?

9 A. No.

10 Q. The next is, "Failing to adhere to the highest standards
11 of honesty, integrity, fair dealing and ethical conduct."

12 Had Coastal ever violated those standards in its
13 dealings?

14 A. No.

15 Q. The next is, "Allowing your officers, directors" --
16 anyway, you can read it -- to damage the goodwill of APS?

17 Had you done any conduct that was damaging to goodwill?

18 A. Never.

19 Q. The next is failing to pay taxes.

20 Did either you personally or Coastal ever fail to pay
21 taxes?

22 A. No.

23 Q. The next is selling unapproved items without consent.

24 Did you or Coastal sell any unapproved items?

25 A. No.

JERRY PARKER - DIRECT

1 Q. The next is failing to affix on each vehicle any
2 pinstriping, lettering, or stenciling job the required
3 warranty label.

4 Were there -- tell me, what was the -- what was happening
5 with the warranty stickers? Tell me what your understanding
6 is about those.

7 A. Well, our customer, which is -- we only had one customer,
8 didn't want them so we didn't put them on.

9 Q. All right. So you were directed by the customer not to
10 put stickers on.

11 A. Correct.

12 Q. Mr. Montemurro in his declaration said, in fact, Coastal
13 never ordered any stickers. Is that consistent with your
14 recollection?

15 A. The only thing we had was back around the first of the
16 year is he decided to make up a thousand dollars worth of
17 stickers for each franchise and charged it to us.

18 Q. Okay. So you were charged for some stickers.

19 A. Uh-huh.

20 Q. Did Mr. Montemurro ever express concern to you that the
21 customer that you were working with did not want stickers on
22 those vehicles?

23 A. I'm sorry, say that again.

24 Q. Did Mr. Montemurro ever express concern or say I'm sorry,
25 I'm going to have to terminate the franchise because the

JERRY PARKER - DIRECT

1 customer is refusing to have stickers?

2 A. No.

3 Q. If you had been told that the franchise would be
4 terminated if you didn't put warranty stickers on, what would
5 you have done in that circumstance?

6 A. We'd have had to have put them on there, but we'd have to
7 take them right back off.

8 Q. All right. The last item is failing to pay monthly fees
9 to APS by the 10th day of each month.

10 Did Coastal fail to pay fees?

11 A. Sometimes they were late depending upon getting all the
12 info together to do it.

13 Q. And did Coastal pay fees based on the billings or based
14 on the actual revenue received?

15 A. It had to be on the actual billing.

16 Q. Okay.

17 A. Not what you received.

18 Q. All right. And how -- why was it like that?

19 A. Because that's the way Mike wanted it.

20 Q. Regardless of what the actual franchise agreement said.

21 A. Correct.

22 Q. So Coastal was never given an opportunity to either be
23 notified of these alleged defaults or an opportunity to cure
24 them.

25 A. Correct.

JERRY PARKER - DIRECT

1 Q. There's been some testimony about services in Florida.
2 Are you providing services in Florida under a different name
3 now?

4 A. No.

5 Q. Did you provide services in Florida under a different
6 name at some point?

7 A. Yes.

8 Q. What was that name?

9 A. Custom Dealer Services.

10 Q. Earlier there was an affidavit -- or declaration from a
11 Mr. Wayne Powell. Do you know Mr. Powell?

12 A. I do.

13 Q. Who was he -- who was Mr. Powell working for in June,
14 July, and August of this year?

15 A. Custom Dealer Services.

16 Q. All right. Can you go ahead and turn to Exhibit 3.

17 A. Yes.

18 Q. Can you tell -- tell the Court what Exhibit 3 is.

19 A. Exhibit 3 is our electronic program that actually you
20 take a picture of the VIN number and it automatically puts in
21 what you did to the car and it bills the customer, sends it to
22 us, sends it to everybody. And essentially it also lists the
23 tech's name, the actual vehicle, and the amount that was
24 charged.

25 Q. So this is work that Wayne Powell was doing in Venice,

JERRY PARKER - DIRECT

1 Florida?

2 A. Correct.

3 Q. Window tinting work.

4 A. Uh-huh.

5 Q. And it is being billed under the name Custom Dealer
6 Services.

7 A. Custom Dealer Services.

8 Q. Can you turn to Exhibit 4 and tell us what those
9 documents are.

10 A. It's pay stubs for Wayne.

11 Q. Okay.

12 A. At Custom Dealer Services.

13 Q. So Wayne was actually being paid by Customer Dealer
14 Services for the periods -- for the period of June 15th to
15 July 15th, July 16th through the 30th, and for the two pay
16 periods in August, right?

17 A. Correct.

18 Q. So when Mr. Powell said in his declaration he was working
19 for Atlantic Dealer Services, that's incorrect, right?

20 A. That is incorrect.

21 Q. And when he said that Atlantic Dealer Services was
22 providing services in Venice, Florida, in August, that's also
23 incorrect.

24 A. Incorrect.

25 Q. Actually, all that work was being done by Custom Dealer

JERRY PARKER - DIRECT

1 Services.

2 A. Correct.

3 Q. And he was paid by Custom Dealer Services.

4 A. That's correct.

5 Q. Mr. Powell also said that you purchased a 3D printer. Is
6 that accurate?

7 A. 3D printer was purchased on my credit card, but I didn't
8 do it.

9 Q. What is the status of that 3D printer purchased with your
10 credit card?

11 A. Still in the box. Never been opened, my understanding.

12 Q. All right. The box has not been opened. You've never
13 used the 3D printer?

14 A. No.

15 Q. Mr. Powell also said that you hired -- you enlisted the
16 assistance of an engineering student to do reverse engineering
17 and copying of Atlantic's patented applicator. Is that true?

18 A. No.

19 Q. Have you asked anybody to copy or reverse engineer the
20 applicator?

21 A. No.

22 Q. So that's just false.

23 A. That's false.

24 Q. Are you still providing services like window tinting in
25 Venice, Florida?

JERRY PARKER - DIRECT

1 A. No.

2 Q. Why not?

3 A. Brian Allison, who's the manager over both those
4 locations, it's the same guy -- he's the guy who called us
5 when he got there because he was a customer from somewhere
6 else and called us to come down there. We got permission from
7 Mike to go down and do that business and look at the
8 possibility of buying the Tampa franchise. Brian called me
9 and essentially said, you know, I'm getting too much heat.
10 Mike is threatening to sue us and this is not going to work so
11 we're just going to have to bail out, and that's what we did.

12 Q. So Mr. Montemurro was threatening to sue Brian Allison,
13 the customer, or get him involved in litigation?

14 A. Get him involved, yes.

15 Q. And that's true even though there's no franchise -- no
16 Atlantic Pinstripe franchise in Venice, Florida, right?

17 A. That's correct.

18 Q. And it's more than 25 miles from any existing franchise.

19 A. I think.

20 Q. How much money was the -- in terms of revenue, monthly
21 revenue, how much money was the Venice, Florida, operation
22 generating?

23 A. In excess of 40,000 a month.

24 Q. All right. And so that 40,000 a month is revenue you've
25 lost as a result of Mr. Montemurro's threats to try to stop

JERRY PARKER - DIRECT

1 business there in Florida.

2 A. Uh-huh.

3 Q. Lastly, in the prior hearing a piece of evidence was
4 introduced on a LinkedIn profile for you. Tell us about your
5 LinkedIn profile.

6 A. I'm not a tech person. I think my son set it up,
7 LinkedIn, several years ago. And essentially, if somebody
8 sends a request, it comes as an email. I push the button to
9 accept. Most of the time it doesn't work. And actually, I
10 think it was either my son who helped put that on there. I
11 never took -- I don't -- I don't deal with it. I don't go to
12 LinkedIn. So I just never considered it. So I got
13 somebody -- actually got Tony to help me how do you delete it,
14 and deleted it off -- deleted it off of there. I'm -- I'm
15 just not into LinkedIn. It's just something one of my -- my
16 son got me into.

17 Q. All right. So -- but your LinkedIn profile has been
18 changed so it doesn't reference Atlantic Dealer Services.

19 A. That's correct.

20 Q. Are you holding yourself out as an Atlantic Pinstriping
21 franchisee?

22 A. No.

23 Q. Are you using the Atlantic trademarks in any manner?

24 A. No.

25 Q. Are you using the applicators in any manner?

JERRY PAKER - CROSS

1 A. No.

2 Q. The Atlantic Pinstriping applicators.

3 MR. HENRIQUES: That's all I have, Your Honor.

4 THE COURT: Cross exam.

5 MR. DeANTONIO: Yes, Your Honor.

6 CROSS EXAMINATION

7 BY MR. DeANTONIO:

8 Q. Good morning, Mr. Parker.

9 A. Good morning.

10 Q. You mentioned, I believe, in your testimony that you had
11 never received any notice of any violations or defaults under
12 the franchise agreement; is that correct?

13 A. Not that I know of.

14 Q. Okay. Could you please look in the stack that I handed
15 up before. There's an Exhibit 12. Could you please look at
16 that document. I think it's been left up on the witness
17 stand.

18 MR. HENRIQUES: If it's easier, I think our Exhibit
19 2 is actually the same as your Exhibit 12. If it's easier to
20 look at the notebook, tab 2. I believe it's the same email.

21 THE WITNESS: Number what?

22 MR. HENRIQUES: Number 2.

23 Q. This is an email that you received; is that correct?

24 A. It was addressed -- I...

25 Q. On the "to" line is jerry@parkermail.biz. Is that your

JERRY PAKER - CROSS

1 email address?

2 A. That's me.

3 Q. Okay. And here Mr. Montemurro is listing a number of
4 defaults under the franchise agreement; is that correct?

5 THE COURT: I can read. Did you get this and did
6 you read it?

7 THE WITNESS: I don't remember.

8 THE COURT: Mr. Parker, did you get it and did you
9 read it?

10 THE WITNESS: I don't remember it, but I...

11 THE COURT: Okay.

12 MR. DeANTONIO: Thank you.

13 THE WITNESS: I'm sure I probably got it from
14 somebody.

15 Q. And do you see where Mr. Montemurro, one of the things he
16 says is that there was an entity formed in a territory that
17 was not owned by the franchisee in this last line of the list
18 here; is that correct?

19 A. Yes.

20 Q. And in fact, the entity that he's talking about was
21 Atlantic Pinstriping Savannah, LLC; is that correct?

22 A. Correct.

23 Q. And that entity was formed without Atlantic's knowledge
24 or permission; is that correct?

25 A. That is correct.

JERRY PAKER - CROSS

1 Q. And you actually signed checks for that entity; is that
2 correct?

3 A. That's correct.

4 Q. Mr. Henriques asked you some questions about the
5 Coastal -- about Coastal. What is Coastal to you?

6 A. I'm one of the -- one-third of the franchisee.

7 Q. Okay. So is it an entity or is it people? What is it to
8 you?

9 A. It's people.

10 Q. Okay.

11 A. It's Ernie, Tony, and me.

12 Q. The Coastal franchisee submitted monthly reports in the
13 name of Atlantic Dealer Services Coastal, LLC; is that
14 correct?

15 A. That's correct.

16 Q. And wrote checks in the name of Atlantic Dealer Services
17 Coastal, LLC.

18 A. That's correct.

19 Q. Did the Coastal franchisee pay royalties on window
20 tinting?

21 A. Yes.

22 Q. I want to ask you about the meeting that you testified
23 that you had with Mr. Montemurro about Dentworks. Do you know
24 if that was before or after the Dentworks lawsuit was filed?

25 A. Well, I think it was -- that was on a Tuesday. When we

JERRY PAKER - CROSS

1 got the filing of the suit was a day or two after that, but it
2 was dated the day before.

3 Q. Okay. So the meeting happened before the lawsuit was
4 filed.

5 A. No, the lawsuit was filed the day before.

6 Q. Okay.

7 A. I didn't know it --

8 Q. Right.

9 A. -- until we got it later -- later on.

10 Q. At the time of the meeting, did you know that a lawsuit
11 had been filed?

12 A. No.

13 Q. And you testified that Atlantic was not involved in the
14 dispute that was the subject of the Dentworks lawsuit; is that
15 correct?

16 A. That's correct.

17 Q. Why is Atlantic Pinstriping Triad, LLC, why has it been
18 named as a party, then, to that lawsuit?

19 A. I think it was because Joey decided to sue everybody and
20 get as many people on it that he could and so -- but Atlantic
21 or Coastal or me, either one of them, not a part of Partners.

22 Q. You testified that you believe the Coastal franchisee had
23 sufficient working capital; is that correct?

24 A. Correct.

25 Q. But you acknowledge that the Atlantic Pinstriping Triad,

JERRY PAKER - CROSS

1 LLC, had been sued in South Carolina for failure to pay its
2 debts; is that correct?

3 A. I'm not aware of that.

4 Q. Okay. Well, I'm talking about the Dentworks lawsuit.

5 A. I must -- say that again.

6 Q. Okay. So you testified that the Coastal franchisee had
7 sufficient working capital and was able to pay its debts; is
8 that correct?

9 A. Correct.

10 Q. Yet all three of the individuals who you claim comprise
11 the Coastal franchisee had been sued in South Carolina in the
12 Dentworks lawsuit for failure to pay debts; is that correct?

13 A. I guess.

14 Q. Okay.

15 A. I don't -- I don't --

16 Q. And -- I'm sorry.

17 A. I said I don't know that for...

18 Q. Okay. Are you aware that the Atlantic Dealer Services
19 Coastal submitted a profit and loss statement showing a net
20 income of negative \$43,000 year to date as of March 31st,
21 2016?

22 A. I saw that in something that came up, but I was not aware
23 of it at the time, no.

24 Q. And you testified -- you admitted that you did not affix
25 stickers to the vehicles; is that right?

JERRY PARKER - REDIRECT

1 A. That's correct.

2 Q. And that you sometimes paid royalty fees late.

3 A. When you say late, after the 10th?

4 Q. After the due date.

5 A. I'm sure, yeah. Always paid them.

6 Q. You discussed the client in Venice, Florida. I think you
7 mentioned Mr. Brian Allison as an individual who works at that
8 client; is that right?

9 A. Yes, he's part owner in both those dealerships.

10 Q. Did the Coastal franchisee serve that client prior to the
11 termination?

12 A. Correct.

13 Q. Okay. So that's a former client of the franchisee; is
14 that right?

15 A. Correct.

16 Q. And that former client would then be covered under the
17 non-solicitation provision of the franchise agreement; is that
18 correct?

19 A. I guess, I don't know.

20 (Plaintiffs' counsel conferred.)

21 MR. DeANTONIO: Nothing else, Your Honor.

22 THE COURT: Redirect.

23 MR. HENRIQUES: Just briefly.

24 REDIRECT EXAMINATION

25 BY MR. HENRIQUES:

ERNIE HORNE - DIRECT

1 Q. You were asked about Exhibit 2, this email. This was
2 actually before Coastal was even created, right, before you
3 became a franchisee, the date of Exhibit 2?

4 A. Correct.

5 MR. HENRIQUES: That's all I have.

6 THE COURT: All right. You may step down.

7 (Witness stepped down.)

8 THE COURT: Anything further?

9 MR. HENRIQUES: Yes, Your Honor. We would call
10 Mr. Ernie Horne.

11 THE COURT: Mr. Horne, come forward and be sworn.

12 WILLIAM ERNEST HORNE, DEFENSE WITNESS, SWORN,

13 DIRECT EXAMINATION

14 BY MR. HENRIQUES:

15 Q. Good morning, Mr. Horne.

16 A. Good morning.

17 Q. Please state your full name for the record.

18 A. William Ernest Horne.

19 Q. All right. Could you tell us a little bit about
20 yourself, Mr. Horne.

21 A. I grew up in this area, in the Charlotte area. Was in
22 the sales business for like 40 years. Retired in 2008. And
23 wanted something to do so was looking around for something and
24 got lucky and got into the pinstriping business.

25 Q. All right. Did you do anything to avoid service of

ERNIE HORNE - DIRECT

1 process in this case?

2 A. No, sir.

3 Q. All right. Tell me how you first got involved with
4 Atlantic Pinstriping.

5 A. Was working at the golf course that Tony was managing
6 after I retired. And Ed Vogler was an employee there as well
7 and he was a franchisee and he talked about -- talked a lot
8 about it. And so it was very interesting so Tony and I
9 decided to pursue the situation and got into the pinstriping
10 business.

11 Q. What was the location of the first franchise that you and
12 Tony had?

13 A. That was in 2010, September. We bought the Greensboro
14 franchise. And then 2011, in April I think it was, 2011, we
15 bought the Charleston franchise. And then in 2012 we bought
16 the Columbia franchise. And in 2013 we sold Greensboro to
17 another franchisee simply because of the logistics. We wanted
18 to focus everything in that area, in the Columbia and
19 Charleston areas and so we sold the Greensboro franchise.

20 Q. Who was listed as the franchisee on all those franchise
21 agreements you just told us about?

22 A. That was myself and Tony.

23 Q. Was there ever any company or entity listed as the
24 franchisee?

25 A. No.

ERNIE HORNE - DIRECT

1 Q. Why not?

2 A. It's not allowed. Has to be the individuals.

3 Q. Who --

4 A. No entity.

5 Q. Who told you that you were not allowed to list an entity
6 as the franchisee?

7 A. We never -- actually, it never came up until we wanted to
8 bring Jerry in as a partner because we can see some value in
9 having him as a partner in the business and what we wanted to
10 do is sell him a third, make him a third owner of the LLC.
11 And that was refused because the LLC could not be the owner of
12 a franchise. It had to be the individuals. And if Jerry
13 bought into the LLC we were operating, that if something
14 happened to Tony or I or both of us, then the franchise would
15 go back to -- Mike would have first option to buy the
16 franchise back and Jerry would be, you know, an owner of the
17 LLC but have nothing.

18 Q. What was the percentage royalty that needed to be paid to
19 Atlantic Pinstripe for the -- under the franchise agreement?

20 A. 7 percent.

21 Q. Okay. And was there an initial franchise fee you also
22 had to pay for your first franchise?

23 A. Yes.

24 Q. What was that fee?

25 A. 35,000.

ERNIE HORNE - DIRECT

1 Q. So you paid 35,000 and you had to pay royalties of
2 7 percent.

3 A. Correct.

4 Q. All right. I wanted to ask about the royalty provision.
5 If you look at -- there's a stack here that's clipped
6 together. The franchise agreement is the very first item in
7 there. It's been marked as Exhibit 1 or Plaintiff's Exhibit
8 1. If you could look at that. And I'll direct your attention
9 to paragraph 7.02. So the pages are numbered although they've
10 got two numbers so it's a little confusing. It's 16 of the
11 document. Or if it's easier, also at the very bottom it says
12 page 23 of 64. If you will look at that. It's two sided.

13 A. Okay. What's the number?

14 Q. 7.02, the royalty fee is what I would like to ask you
15 about.

16 A. I'm looking.

17 There it is. "7.02 Royalty Fee." Got it.

18 Q. And what does it say in terms of what that 7 percent is
19 paid on?

20 A. You will pay monthly --

21 THE COURT: I can read.

22 MR. HENRIQUES: Okay.

23 Q. So it is based on revenues, not billings, right?

24 A. Yes, that's what it says.

25 Q. Okay. Was that an issue that came up early on in the

ERNIE HORNE - DIRECT

1 operation of the franchise?

2 A. Yeah, our very first month we thought that we would be
3 paying franchise -- royalty fees on revenues, but that was not
4 the case. We learned that it's on billings. So we had to --
5 until we got paid, we had to put more money in to the company
6 to pay the royalty fees until -- you know, to cover that first
7 month until we got paid by our dealers, which our terms were
8 net 30 days and we were lucky if we got paid in 60 days.

9 Q. So Mr. Montemurro was saying regardless of what the
10 language of the agreement was, he wanted you to pay based on
11 billings?

12 A. Billings, correct.

13 Q. And so you were actually paying a month or two ahead of
14 time.

15 A. Ahead, yes.

16 Q. Right. You would not get that revenue for 30 to 60
17 days --

18 A. Correct.

19 Q. -- after doing that work.

20 A. Correct.

21 Q. So there's been some testimony about late payments.
22 Under the language of when the payments are actually due, you
23 were paying one to two months early, correct?

24 A. Correct.

25 Q. Tell me about how the business grew from 2010 until this

ERNIE HORNE - DIRECT

1 year.

2 A. Well, like I said, we bought our first franchise in 2010
3 and another one in 2011, another one in 2012, sold one in
4 2013, and then received permission to do work in Florida in
5 2015. And we had developed the territories that we were in
6 and got our business up to in excess of a million dollars a
7 year.

8 Q. Okay.

9 A. And we had 14 employees, 8 trucks on the road. Lot of
10 investment. A thriving business I would describe it as.

11 Q. You mentioned trucks on the road. Did those have -- were
12 you making payments on those trucks?

13 A. Yes.

14 Q. And were those payments -- were those kept current?

15 A. Oh, yes.

16 Q. And was -- were the franchises profitable?

17 A. Yes. Yes.

18 Q. How were -- there's been some evidence about issues with
19 late payments and other problems. Up until June of 2016, how
20 were those issues handled over the course of the relationship
21 between the franchises and Atlantic Pinstriping?

22 A. Well, we would pay them. Could have been late, but they
23 got paid. I don't understand --

24 Q. Sure. Would they -- would you get an email or a phone
25 call if something was late?

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1 A. Yeah.

2 Q. And then you would bring it current.

3 A. Sure. Yeah.

4 Q. There was a reference to Exhibit 2 which is a notice
5 where at one point the franchise was put on a 90-day probation
6 period; is that right?

7 A. Yes.

8 Q. All right. And did it successfully complete that 90-day
9 period?

10 A. Apparently.

11 Q. And in fact, the franchise was renewed in 2015, a little
12 more than a year after this, right?

13 A. Yes, October.

14 Q. So the -- so you were told the problems, you addressed
15 the problems, and the franchise was renewed.

16 A. Correct.

17 Q. Did you expect based on the six years of history to be
18 given notice of a deficiency and an opportunity to fix it?

19 A. Yes, absolutely.

20 Q. Did you have some meetings with Mike Montemurro in that
21 April time frame, April 2016?

22 A. Yes, I did.

23 Q. And were you present during the meeting that Mr. Parker
24 described when Mr. Montemurro visited the office to look at
25 paperwork and then didn't?

ERNIE HORNE - DIRECT

1 A. I was.

2 Q. From your meetings with him, what was -- what did
3 Mr. Montemurro want? What was he after?

4 A. Basically he wanted to get rid of Tony. In that meeting
5 that Jerry talked about in April, he was -- he stated that he
6 was going to terminate us, and we talked -- discussed it some
7 more. And he said, Come up with a plan just so it doesn't
8 involve Tony and we'll look at it.

9 Q. And when he said he was going to terminate you, did he
10 give you any reason for the termination?

11 A. No.

12 Q. Did he indicate you were in breach of any obligation
13 under the franchise agreement?

14 A. No.

15 Q. Did you, in fact, put together a plan where you would
16 essentially be buying out Tony's interest?

17 A. Yes, I did.

18 Q. And is that what Exhibit 6 is in the notebook?

19 A. Yes, that is.

20 Q. So this was a proposal where you were going to purchase
21 Tony's interest in the franchise.

22 A. Tony's and Jerry's.

23 Q. All right. And was that something Mr. Montemurro was
24 interested in?

25 A. Yes. Yes. I delivered it to his office and we discussed

ERNIE HORNE - DIRECT

1 it and actually it was immediately changed. Brought in
2 Mr. Vogler to be a partner and then Mike himself would be a
3 partner in the LLC that would be formed to operate the
4 franchises.

5 Q. Okay. And following your proposal, did Mr. Montemurro
6 then come up with a revised proposal that he thought would
7 work?

8 A. Yes. Yes, he would -- Mike would be a partner, Ed Vogler
9 would be a partner, and I would be a partner. It would be a
10 three-way company.

11 Q. And could you turn to Exhibit Number 7.

12 A. Okay.

13 Q. Is this an email Mike Montemurro sent to his Nevada
14 franchise lawyer Rob Vinson?

15 A. Yes, that's -- that's what it looks -- yes.

16 Q. And he has copied you, Tony, Jerry, and Ed Vogler on the
17 email --

18 A. Yes.

19 Q. -- right?

20 A. Yes.

21 Q. And he's asking his attorney to draft up paperwork to
22 effect this change.

23 A. Yes.

24 Q. All right. Now, let's look at Exhibit 8 which is a
25 response from Rob Vinson to Mike Montemurro. How did you get

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1 Exhibit 8?

2 A. It was handed to me when I was in Mike's office.

3 Q. So you were in Mike's office and he handed you a copy of
4 this email from the franchise lawyer.

5 A. Yes.

6 Q. And does the email raise the possibility of simply
7 terminating the franchise?

8 A. Yes.

9 Q. All right. And is that down on number 7?

10 A. Number 7, yes.

11 Q. And he points out that under this solution, Tony and
12 Jerry would not have rights and would not need to sign any
13 documents.

14 A. Correct.

15 Q. So the lawyer is saying that rather than do a mutual
16 transfer that everyone signs off on, he's telling Mike he can
17 simply do a termination.

18 A. Terminate, yes.

19 Q. And a month later a termination notice was delivered.

20 A. Correct.

21 Q. But there's nothing in the letter from the lawyer
22 indicating that there's any basis for terminating the
23 franchise agreement, is there?

24 A. No.

25 Q. It's simply another way to move forward with the creation

ERNIE HORNE - DIRECT

1 of a new franchise without needing signatures of Tony and
2 Jerry.

3 A. Correct.

4 Q. But in fact, after the termination, you were never given
5 an opportunity to become the franchisee for Columbia or
6 Charleston, were you?

7 A. No. The -- after the South Carolina lawsuit from Joey
8 Williamson suing Partners Detail and Atlantic Pinstriping
9 Triad, Mike told me that if Tony challenged him on this
10 termination, on this reorganization termination, that he would
11 fry us all, put us all in the grease, and I would be paying
12 him for the rest of my life.

13 Q. Are those his exact words?

14 A. Exact.

15 Q. That he would fry you all.

16 A. Yes. And after there was a counter lawsuit and I
17 explained that the counter lawsuit against Joey Williamson
18 naming Mike as third party was necessary so that Mike could
19 confirm that there was a contract that was breached and that
20 was caused by Joey.

21 Q. Let me ask you about -- I asked about termination of the
22 Coastal franchise with Mr. Parker on Exhibit 1. Let me ask
23 you some of those same questions --

24 A. Okay.

25 Q. -- Mr. Horne.

ERNIE HORNE - DIRECT

1 If you could turn to the first exhibit in this notebook.
2 The first grounds for -- well, and let me ask you the
3 same question. Had you received any notice of default prior
4 to being handed this on June 14, 2016?

5 A. There had been emails when something was in default or
6 something was wrong, but those were -- in my opinion, those
7 were to cure.

8 Q. Right. So you would get told of an issue and given an
9 opportunity to cure it.

10 A. Yes.

11 Q. Let me ask about some of the specific allegations in this
12 letter. The bottom paragraph of the first page says that you
13 are unable to pay debts as they become due. Is that true?

14 A. No.

15 Q. Were both the Columbia and Charleston franchises paying
16 debts as they became due?

17 A. Yes.

18 Q. There's been some testimony about this South Carolina
19 lawsuit. Dentworks wasn't owed any money by you or Tony or
20 Atlantic Pinstriping Triad, right?

21 A. That is correct. It was a frivolous lawsuit.

22 Q. So the allegation that you were unable to pay your debts
23 was a false allegation.

24 A. Correct.

25 Q. And had that ever been brought up before? Had Mike ever

ERNIE HORNE - DIRECT

1 said you guys don't have sufficient money to pay your debts or
2 you're insolvent?

3 A. No. There was an issue with a window film vendor that
4 kept saying we owed them money and we kept asking for invoices
5 and didn't get invoices. And he called Mike. I think Mike
6 had done business with him as well. And finally we got -- all
7 we would get was a spreadsheet which we had never seen an
8 invoice. And finally we got invoices. And I don't have
9 firsthand knowledge that we did get invoices. I don't have
10 firsthand knowledge that they were paid. But Tony can address
11 that.

12 Q. Okay. So you may have had disputes with some vendors
13 like the window film vendor, but that didn't mean --

14 A. Sure.

15 Q. -- that you were insolvent, that you personally were
16 insolvent or that Atlantic --

17 A. Oh, no. No, sir.

18 Q. And you're not insolvent.

19 A. No.

20 Q. All right. Let's look, then, at this laundry list of
21 defaults on page 2. And we'll just go through them quickly.
22 Had Coastal or -- I'm sorry, had Columbia or the Charleston
23 franchises ever used the system or marks in connection with
24 some other business activity?

25 A. No, sir.

ERNIE HORNE - DIRECT

1 Q. Had they used them outside the covered territories
2 without permission?

3 A. No, sir.

4 Q. Had they failed to comply with APS system standards?

5 A. Not to my knowledge.

6 Q. In fact, did you ever get any explanation about what
7 system standards were supposedly not being complied with?

8 A. No, sir.

9 Q. All right. How about failed to operate it diligently or
10 consistent with sound business practices?

11 A. No.

12 Q. In fact, those franchises had been very successful from a
13 business standpoint, right?

14 A. Yes. Relative to the other franchises it was very
15 successful.

16 Q. All right. The next one is maintain working capital and
17 sufficient net worth. Was there sufficient capital and net
18 worth to continue operations?

19 A. Yes.

20 Q. The next is adhering to the standards of honesty,
21 integrity, and fair dealing. Had the franchises done -- the
22 Columbia and Charleston franchises done anything in violation
23 of those standards?

24 A. No, sir.

25 Q. The next is allowing officers, et cetera, to engage in

ERNIE HORNE - DIRECT

1 unlawful conduct or something damaging goodwill. Had that
2 taken place?

3 A. No.

4 Q. Did those -- did Columbia and Charleston franchises have
5 any control over what Dentworks said in its lawsuit?

6 A. None. No. You know, I've never met the guy. I don't
7 know anything about him.

8 Q. Failing to pay taxes when due. Had the franchise paid
9 taxes when due?

10 A. Except twice.

11 Q. Tell us about -- you're talking about tax liens?

12 A. Yes, tax liens.

13 Q. Tell us about those.

14 A. One of those was proved -- right away was proved to be
15 false and was dismissed. And the other is -- we reached an
16 agreement to pay it.

17 Q. Okay.

18 A. And the lien was released. We just paid it off.

19 Q. All right. So you made -- reached an agreement -- one
20 was an improper lien --

21 A. Yes.

22 Q. -- that got dismissed.

23 A. Correct.

24 Q. The other one you reached an agreement sometime ago to
25 pay it off and the lien has been dismissed.

ERNIE HORNE - DIRECT

1 A. Correct.

2 Q. So both of those -- that's not an issue.

3 A. No.

4 Q. The next one is offering and selling unapproved items
5 without consent. Has -- have the franchises done that?

6 A. No.

7 Q. The next is failing to affix window -- warranty labels.
8 Tell us about the warranty labels.

9 A. We have used them in the past; but where our dealers
10 didn't allow us to put them on the cars, we didn't put them on
11 the cars.

12 Q. And did you ever get -- has that been going on for some
13 time?

14 A. Yes.

15 Q. Did you have discussions --

16 A. For a long time.

17 Q. Did you have discussions with Mike Montemurro about the
18 window stickers?

19 A. Yes.

20 Q. What did you tell him about the window stickers?

21 A. Well, I think they're a valuable marketing tool. I do
22 see the value in them. I always have. And I would use them
23 if I could. But it's a waste to put them on there and have
24 them pulled right back off.

25 Q. That's what some dealers were saying is --

ERNIE HORNE - DIRECT

1 A. Correct.

2 Q. -- you got to pull them back off?

3 A. Yes.

4 Q. You can comply, but just turn around and take them right
5 back off because they didn't want them on there.

6 All right. And then the last is failing to pay monthly
7 fees by the 10th of the month. Tell us about that.

8 A. Yeah, we -- we paid them in the current month. They were
9 always paid in the current month. Might not have been paid by
10 the 10th, but they were always paid in the current month.

11 They were never -- never later than 30 days to my knowledge.

12 Q. All right.

13 A. Or 20 days actually.

14 Q. And had Mr. Montemurro ever told you that he was going to
15 terminate the franchise agreements if items that are listed
16 here on page 2 were not fixed? Did he ever say your franchise
17 agreement will be terminated if you, for example, you know,
18 fail to pay -- don't resolve those tax liens or --

19 A. No.

20 Q. -- failed to maintain --

21 A. No.

22 Q. So you were given no opportunity to cure or address these
23 items; is that right?

24 A. Correct.

25 (Defense counsel conferred.)

ERNIE HORNE - CROSS

1 MR. HENRIQUES: That's all I have, Your Honor.

2 THE COURT: Cross.

3 MR. DeANTONIO: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. DeANTONIO:

6 Q. Mr. Horne, good morning.

7 A. Good morning.

8 Q. Could you please look at the stack of exhibits that I
9 handed up to Ms. Montemurro earlier and find Exhibit 13. And
10 just let me know when you have it.

11 A. 13.

12 Q. Okay. Exhibit 13 is a continuation of that -- of the
13 email chain from Exhibit 12 which was the email that
14 Mr. Montemurro sent listing a number of defaults; is that
15 right?

16 A. Yeah, I believe so.

17 Q. And you did not dispute that any of those defaults had
18 occurred, did you?

19 A. No.

20 Q. And you acknowledge that they actually did occur.

21 A. Sure. Yes.

22 Q. Let's look next at the letter that you sent to
23 Mr. Montemurro, the letter of intent, which is in the binder
24 at Exhibit 6.

25 A. Okay.

ERNIE HORNE - CROSS

1 Q. Was it your understanding that Mr. Montemurro requested a
2 change in ownership of the Charleston and Columbia and Coastal
3 franchises so that the defaults would stop occurring?

4 A. I don't -- I don't know that that was the reason that he
5 wanted a change. I can't -- I can't say yes or no to that
6 because I don't know.

7 Q. Okay. Had this agreement been consummated, there would
8 have been no need for termination of the franchise agreements;
9 is that correct?

10 A. Correct.

11 Q. Okay. So was this an effort by Mr. Montemurro to reach a
12 resolution without need for termination of the franchise
13 agreements?

14 A. It was an effort by me to reach a resolution.

15 Q. And there were continued negotiations for at least a
16 month; is that right?

17 A. That's right.

18 Q. And then on May the 13th, 2016, Atlantic Pinstriping
19 Triad, LLC, sued Atlantic Pinstriping and Mr. Montemurro; is
20 that correct?

21 A. Yes.

22 Q. And did the negotiations fall apart after Atlantic
23 Pinstriping Triad and Mr. Tony Horne sued the plaintiffs in
24 this case?

25 A. Yes.

ERNIE HORNE - CROSS

1 Q. Mr. Horne, you read the franchise agreement before you
2 signed it; is that correct?

3 A. Yes.

4 Q. And did you intend to comply with that agreement?

5 A. Certainly.

6 Q. And if there's a provision in that agreement that
7 provides that no notice or intent to cure is required upon a
8 certain event of default, would you think that that provision
9 should be enforced?

10 A. Well, if you want my opinion, we had a thriving business
11 going. Fourteen employees, eight vehicles on the road. And
12 at the time of threatened termination, my mindset was I have
13 to do something to protect these employees, to protect our
14 investment in time and money into this company --

15 THE COURT: Okay. Stop the narrative. It's
16 unresponsive to the question. Let's go.

17 Q. Mr. Horne, are you aware that a judgment had been filed
18 in South Carolina against Atlantic Pinstriping Triad?

19 A. A judgment? No.

20 Q. Okay. Could you please look at Exhibit 23 that's in the
21 stack of papers that I handed up to Ms. Montemurro.

22 A. 23?

23 Q. 23.

24 A. Oh, yes. Okay.

25 Q. And that's a judgment for \$38,000.

ERNIE HORNE - CROSS

1 A. I don't know. I wasn't aware of this.

2 Q. Okay. It was filed, looks like August 15th, 2016; is
3 that right?

4 A. Um...

5 Q. There's a stamp on the right near the top on the first
6 page.

7 A. Yes. Well, on the 9th of May 2016.

8 Q. Okay. That's the --

9 A. July 29, '16, on the bottom left.

10 Q. Okay. I'll just represent that it's file stamped
11 August 15th. But you already --

12 A. Oh, yeah, I see that now.

13 Q. You already stated that there had been tax -- at least
14 one -- two tax liens, at least one you acknowledge a
15 settlement was reached; is that correct?

16 A. Correct.

17 Q. And are you aware that the Atlantic Pinstriping Triad
18 entity submitted profit and loss statements showing negative
19 net income?

20 A. Yes.

21 Q. Yet you claim that the franchisee had sufficient working
22 capital?

23 A. Well, that was one P and L statement.

24 Q. You mentioned that the Charleston and Columbia
25 franchisees had never operated outside of their territories;

ERNIE HORNE - CROSS

1 is that correct?

2 A. Correct.

3 Q. Didn't the Charleston and Columbia franchisees operate in
4 Savannah, Georgia, without authorization?

5 A. No, we had permission to do due diligence in that area to
6 see if we wanted to buy it.

7 Q. When was that permission requested?

8 A. I don't remember exactly, but there should be a document
9 because any time we're looking at a territory, new territory,
10 we have to get permission, which there is a form for that.

11 Q. Mr. Horne, I'm going to hand you Exhibit Number 108.

12 Is Exhibit 108 the request for permission to serve
13 Savannah, Georgia?

14 A. Yes, it is.

15 Q. And it's dated July 15, 2015, right?

16 A. Yes, sir.

17 Q. And in fact, the Charleston and Columbia franchisees had
18 served Savannah prior to making this request.

19 A. I think there was -- I seem to -- well, I'm pretty sure
20 there was a request prior to this to do due diligence in the
21 Savannah area to see if we wanted to buy that territory and we
22 decided against it, and then we had body shops calling from
23 Savannah wanting us to do repairs there. So this would cover
24 that type of business, allowing us to go to Savannah to make
25 body shop repairs.

ERNIE HORNE - CROSS

1 Q. Okay. Just looking back at Exhibit 13, please.

2 A. 13?

3 Q. Yes.

4 And can you please look at page 5 of that document when
5 you get there.

6 A. 13, okay. Page 5?

7 Q. Yes, sir.

8 A. Okay.

9 Q. This is about a month and a half before the approval
10 request that we just looked at, right?

11 A. Yes.

12 Q. And you were telling Mr. Montemurro that you will cease
13 and desist all activity in the Savannah market; is that
14 correct?

15 A. Yes.

16 Q. And you did not dispute his statement in the email to
17 which you were responding that he was assured that there would
18 not be an entity created in Savannah. You did not dispute
19 that, did you?

20 A. No.

21 (Plaintiffs' counsel conferred.)

22 MR. DeANTONIO: No further questions at this time,
23 Your Honor.

24 THE COURT: Any redirect?

25 MR. HENRIQUES: No redirect, Your Honor.

MICHAEL MONTEMURRO - DIRECT

1 THE COURT: You may step down.

2 || (Witness stepped down.)

3 THE COURT: All right. We'll take a 15 minute
4 recess.

5 (Brief recess at 12:07 p.m.)

6 THE COURT: All right. Do you have another witness?

7 MR. HENRIQUES: No, Your Honor. That would conclude
8 defendants' evidence.

9 THE COURT: All right. Do you have any rebuttal?

10 MR. DeANTONIO: Yes, Your Honor. We have very brief
11 questions for Mr. Montemurro and Mrs. Montemurro.

12 THE COURT: All right. You may recall them.

13 MR. DeANTONIO: We would first call Mr. Montemurro,
14 Your Honor.

15 THE COURT: All right. Of course, you're under
16 oath. You may take the stand. You remain under oath,
17 Mr. Montemurro.

18 || THE WITNESS: Thank you.

19 MICHAEL MONTEMURRO, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN,

20 DIRECT EXAMINATION

21 BY MR. DeANTONIO:

22 Q. Mr. Montemurro, did you hear some testimony today
23 accusing you of saying something along the lines of "I will
24 fry you"?

25 A. Yes, I did.

LAURA MONTEMURRO - DIRECT

1 Q. Did you ever say anything like that?

2 A. No, I did not.

3 MR. DeANTONIO: No further questions, Your Honor.

4 THE COURT: Step down. Next.

5 (Witness stepped down.)

6 MR. DeANTONIO: We would like to briefly call
7 Mrs. Montemurro back to the stand.

8 THE COURT: All right. Mrs. Montemurro, you remain
9 under oath. You may assume your seat at the witness stand.

10 LAURA MONTEMURRO, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN,

11 DIRECT EXAMINATION

12 BY MR. DeANTONIO:

13 Q. Mrs. Montemurro, do you recall some testimony about
14 whether Atlantic required franchisees to pay royalties on
15 billings versus receipts?

16 A. Yes.

17 Q. What is your understanding of what Atlantic required
18 franchisees to pay?

19 A. That the royalties were to be paid on gross sales.

20 Q. Okay. Do you recall some testimony about whether the
21 dealership operated by Mr. Brian Allison preferred to have
22 stickers on the cars or not stickers on the cars?

23 A. Yes.

24 Q. Do you know whether that dealership is currently
25 utilizing pinstriping services?

LAURA MONTEMURRO - DIRECT

1 A. Yes, they are.

2 Q. Who is providing those services?

3 A. The Atlantic Pinstriping Southwest Florida franchisee.

4 Q. And are stickers applied to cars, if you know?

5 A. Yes, they are putting them on every vehicle as well as
6 putting a warranty card and a brochure in every vehicle that
7 is striped.

8 Q. Including the dealership for Mr. Allison?

9 A. Yes.

10 Q. Did you meet with Mr. Allison last week?

11 A. Yes.

12 Q. Did you have any -- did you or anybody else threaten him
13 at all regarding the conduct of who he chose to do --

14 A. Absolutely not.

15 Q. -- Pinstriping services?

16 A. Absolutely not.

17 Q. Okay. Why did -- what did he say about his decision to
18 utilize the Atlantic Pinstriping franchisee in southwest
19 Florida?

20 A. He spoke very highly of him and he was looking forward to
21 continuing the relationship and using his services for the
22 pinstripe.

23 Q. Has anybody that you are aware of ever threatened
24 Mr. Allison?

25 A. No.

LAURA MONTEMURRO - CROSS

1 MR. DeANTONIO: No further questions.

2 THE COURT: Any cross?

CROSS EXAMINATION

4 BY MR. HENRIQUES:

5 Q. So have you been down to Venice, Florida?

6 A. Yes, we were there last week.

7 Q. So you went and visited Brian Allison there --

8 A. We did.

9 Q. -- at the dealership?

10 A. Yes, sir.

11 Q. Who is doing the work for Atlantic Pinstriping now in
12 Venice?

13 A. It would be Atlantic Pinstriping Southwest Florida.

14 Q. So they're doing work outside of their territory.

15 A. Correct.

16 Q. And who is the actual technician that's supplying the --

17 A. It's Mark Coffers (phonetic).

18 Q. And did you actually see stickers applied to the cars?

19 A. Yes.

20 Q. Did you have a discussion about the stickers?

21 A. With Mr. Allison, I don't recall. But they're on the
22 showroom floor with stickers and brochures and warranty cards
23 in every vehicle, as well as on the lot.

24 Q. And you don't know -- do you know when you started --

25 A. Mr. Allison started using the southwest Florida franchise for

LAURA MONTEMURRO - CROSS

1 services?

2 A. I'm not positive the exact date, but he did call Mark and
3 ask him to come and service his territory.

4 Q. So Mr. Allison called Mark who is the person in charge of
5 the --

6 A. I believe he texted him actually.

7 Q. But do you know what month that was?

8 A. I'm sorry, I don't have an exact date for you.

9 Q. Okay.

10 A. I can find out for you.

11 MR. HENRIQUES: That's all the questions I have.

12 REDIRECT EXAMINATION

13 BY MR. DeANTONIO:

14 Q. Did the Naples -- or southwest Florida franchisee obtain
15 permission to work outside of the territory?

16 A. Yes.

17 MR. DeANTONIO: Nothing further.

18 THE COURT: All right. You may step down, ma'am.

19 (Witness stepped down.)

20 THE COURT: All right. That concludes the evidence.

21 How long do you folks need on oral argument?

22 MS. ANDERSON: Your Honor, 20 minutes.

23 THE COURT: Total. Split it or whatever you want to
24 do with it. You go first and last.

25 Can you go 20 minutes?

1 MR. HENRIQUES: I think I can do -- I was thinking
2 30, but I think I can probably make 20 happen, Your Honor.

3 THE COURT: Twenty. It's getting late. Lunchtime
4 beckons.

5 Go ahead, Ms. Anderson.

6 MS. ANDERSON: Go ahead now?

7 THE COURT: You have the burden of proof. You may
8 proceed.

9 MS. ANDERSON: Understood.

10 Your Honor, you always hear that an injunction is an
11 extraordinary remedy in cases like this. I want the Court to
12 understand what an extraordinary step this has been for
13 Atlantic and Mr. Montemurro. They have never done anything
14 like this. They wouldn't do it without a compelling reason.

15 I'd like to talk about two things: One, the reasons
16 we're here today, the harm to their intellectual property that
17 brought us here; and the second, why we should win under this
18 standard for getting an injunction.

19 First, the first of these is the harms. So Atlantic
20 and Mr. Montemurro built a successful system based on three
21 pieces of intellectual property, and each one of those is
22 being harmed every day by the defendants.

23 The first one is the Atlantic technology, the
24 patented invention that Mr. Montemurro invented. And that
25 includes the applicators, the heads, and the method. He

1 licenses this to Atlantic and Atlantic licenses it to the
2 franchisee, but only during the term of the agreement. When
3 the franchise terminates, the franchisees must return the
4 equipment.

5 That hasn't happened here. Laura Montemurro
6 testified that the defendants have 7 pinstriping applicators
7 and 61 heads that have not been returned and they -- and that
8 is a violation of the agreement.

9 Now, the defendants had claimed in the last hearing
10 that they're eager to return this equipment, at least a
11 portion of it. So why the change of heart? Wayne Powell, the
12 gentleman who worked for defendants, submitted a sworn
13 statement that they've copied the technology and that they are
14 using it in their illegitimate pinstriping business.

15 Now, we heard from Mr. Parker that, yes, he bought a
16 3D printer. Someone charged it to his credit card. We have
17 no idea who. It's just sitting in the box unopened. Why
18 would someone spend tens of thousands of dollars on a printer
19 and never use it? We think the answer is that they have used
20 it and that that's why they don't mind returning the tools now
21 because they have what they need from them. We haven't heard
22 anything to refute that.

23 It would also explain why they ordered an enormous
24 stockpile of paint because they would be ready when they have
25 a copied tool, either an entire tool or part of it, to

1 continue with their business.

2 We heard Ed Vogler at the last hearing talk about
3 what a game changer this technology is. He talked about how
4 it's something that no one else has. It helps them work more
5 quickly, more profitably, and it was the first thing he
6 mentioned when he talked about the benefits to the franchise
7 system.

8 We believe that the defendants have taken this
9 technology and we ask the Court to stop them from continuing
10 to use it for their own benefit.

11 The second piece of intellectual property that is at
12 risk here is the defendants' brand. And Your Honor, you've
13 handled many cases like this. You understand about the
14 trademark and the value of it. Mr. Montemurro testified about
15 that. Mr. Vogler testified about how valuable this is to the
16 system.

17 I'm not going to go through the litany of examples
18 of evidence of damage to the brand. I'd like to mention just
19 two, though.

20 One is the email that's Exhibit 22, our Exhibit 22
21 from Scott Clark Toyota's service director, David Blackburn.
22 And Mr. Blackburn had dealt with the defendants when they were
23 in business in Columbia. And at the first hearing Mr.
24 Montemurro testified about how Mr. Blackburn just looked at
25 him with contempt and said, "I've dealt with your company

1 before," when they were first introduced. And so he
2 memorialized his issues with the defendants in an email. In
3 that email he said that the defendants' work ethic, their work
4 quality, their attitude were, quote, horrible. His
5 experiences with them made him decide he would never use
6 Atlantic Pinstriping again. They had absolutely no concern
7 for customer satisfaction.

8 Now, Mr. Montemurro testified that he had been at
9 Scott Clark Toyota for 20 years and despite that long
10 relationship, once Mr. Blackburn came in, it took him months
11 to get Mr. Blackburn's trust.

12 So that's just one of many examples of how our
13 clients are being hurt by what the defendants are doing.

14 You also heard Mr. Montemurro and others today talk
15 about tax liens, talk about unpaid vendors and the lawsuits
16 that result from that. And each of those is in the name of an
17 Atlantic Pinstriping entity, which hurts the brand. There can
18 be no question that this hurts the brand. So we ask also that
19 the Court stop this harm from continuing to occur.

20 The third part of intellectual property that is
21 being damaged here is the Atlantic Pinstriping system. Now,
22 the defendants have maintained that they've returned the
23 operating manual so that should be the end of the story.
24 There's nothing else at issue. But the fact is, you can't,
25 just by returning an operations manual, erase everything that

1 the defendants learned about the Atlantic system. They still
2 have all the information about how to start this kind of
3 franchise, what kind of specifications and standards they
4 need, how to market this service.

5 You've heard testimony about the defendants' use of
6 this system. They started two unauthorized franchises. One
7 we heard about, the Montemurros learned about from their
8 Florida franchisee where they offered to set someone up as an
9 Atlantic Pinstriping franchisee with no authorization or even
10 information to the Montemurros about that.

11 You also heard that they are -- they set up a bank
12 account and are writing checks for Atlantic Pinstriping
13 Savannah and Mrs. Montemurro learned that when she was handed
14 a check by Jerry Parker.

15 In addition to that, they've posed as the franchisee
16 with their software vendor to try to get the vendor to cancel
17 Atlantic's account. Atlantic's agreements were written to
18 protect against just this kind of harm and that is, at least
19 in part, in the non-competes and the exclusive territory that
20 are a key part of the agreement. And the defendants signed
21 these agreements. They committed to respect their terms, both
22 during their terms and after their terms. They've utterly
23 failed to do that.

24 I'm not going to go into the exact terms of the
25 non-compete because I know Your Honor has read the materials.

1 I will if you want, but it seems like something I don't need
2 to talk about now.

3 The point is that we know that from both Wayne
4 Powell and from Travis Gordon, the private investigator, that
5 the defendants have continued to operate in their former
6 territories. They have continued to use the trademarks.
7 They've continued to use the telephone numbers. They've
8 continued to use the business names. Mr. Gordon and Barefoot
9 Investigation made an appointment this past week with
10 defendants' employees to have a car pinstriped because we
11 intended for them to see whether the pinstriping service was
12 going on, but also to get a look at the tool they were using.

13 They were told that Matt Bernard -- they were told
14 by the dealer, who is the franchisee's customer, that Atlantic
15 Pinstriping is doing pinstriping through Atlantic Dealer
16 Services, the same franchisee that had been there before, and
17 they gave -- they were given a number to call. That was one
18 of the numbers that Laura Montemurro testified is an Atlantic
19 Pinstriping number.

20 They eventually connected with Brian Guggenbiller
21 through another Atlantic Pinstriping number and he actually
22 set up -- made the arrangements for the appointment. As it
23 turns out, Mr. Guggenbiller tracked down the investigator
24 through LinkedIn and when the investigator got a LinkedIn
25 notice that somebody has been visiting your account, it was

1 from Brian Guggenbiller who lists himself as director of
2 operations at Atlantic Dealer Services.

3 Now, we provided a voicemail where he responded that
4 this was Custom Dealer Services. And there was other
5 testimony about the defendants operating as Custom Dealer
6 Services. Whether they're operating as one or the other, the
7 fact is they're still operating. They're still operating in
8 the territory where they agreed they would not compete after
9 the termination. And Your Honor, defendants are going to
10 continue to do this unless the Court orders them to stop and
11 we ask the Court to do that.

12 The next thing I want to talk about is why we meet
13 the test for getting an injunction. And before we talk about
14 why we meet it, I just want to clarify what the test is. And
15 again, we covered this extensively in our briefing and I don't
16 want to go into it more than the Court wants. But the point
17 is we believe there is no threshold burden as the plaintiffs
18 argued. And the *Blackwelder* standard that they call for does
19 not apply anymore. And this Court has recognized that that's
20 been overruled and has applied the new standard in *Bica*. I
21 could go on about that, but I won't unless you have any
22 particular questions about it, about that standard.

23 THE COURT: *The Real Truth About Obama* is the case,
24 I believe.

25 MS. ANDERSON: Exactly. Exactly.

1 MR. HENRIQUES: We agree that's the standard, Your
2 Honor.

3 MS. ANDERSON: So under this -- under the test of
4 *Bica*, which is the test that's applicable here, we have to
5 show four things. We have to show we're likely to succeed on
6 the merits, we're likely to suffer irreparable harm, the
7 balance of hardships tips in our favor, and an injunction is
8 in the public interest. This seems like one of the clearest
9 cases I've ever seen for showing that those standards are met.

10 Success on the merits. We had valid rights in
11 intellectual property and the defendants have breached
12 those -- and infringed those rights. We had valid contracts
13 and the defendants breached those contracts. They -- we
14 counted 48 defaults in the last year alone. So -- and over
15 the years there's been ample evidence of Mr. Montemurro and
16 Atlantic trying to work with the defendants trying to get them
17 in compliance and it never worked out. Finally it got to the
18 point that they were getting sued. They were getting calls
19 from vendors saying your franchisee owes us money, refuses to
20 pay, and so we're going to bring you into a lawsuit. It got
21 to the point that Atlantic had no choice but to terminate
22 these defendants. And it did that and it had the right to do
23 that. So there was harm there.

24 And that didn't stop after the termination because
25 then the defendants violated their post-termination

1 non-compete. Now, a question on likelihood of success on the
2 merits will be was this -- is this non-compete enforceable?
3 And Your Honor, we would submit that this -- courts in this
4 jurisdiction enforce covenants like this every -- all the
5 time, routinely. *Bica* is a very close example to this. A
6 2-year period of non-compete with a 25-mile radius is less
7 restrictive than many covenants that this Court has enforced.

8 And more to the point, Your Honor, we've shown that
9 there is a legitimate business reason for the enforcement of
10 this covenant. Ms. Montemurro testified that they often allow
11 their franchisees to expand into neighboring areas and that
12 sometimes when dealers are on the periphery of a territory,
13 their customers could easily travel 25 miles or more to get
14 service. So this 25-mile restriction allows a franchisee to
15 service the dealers -- the customers of the dealers who are
16 their clients.

17 Enforcing this non-compete is not only well within
18 the law of this jurisdiction, but it's also in the public
19 interest. This is a reasonable restriction and it comports
20 with a legitimate business purpose.

21 Irreparable harm. Atlantic and the Montemurros are
22 being harmed in ways that can't be measured by money. They've
23 lost and they continue to lose value in the brand. Their
24 technology is at risk. Their operating system is at risk.
25 And more to the point, their franchisees are harmed. Their

1 whole system is harmed when someone who takes their system and
2 stops paying royalties on it but continues to use it is able
3 to compete with them when they're paying royalties. So this
4 hurts not only Atlantic, but it hurts the franchisees. And
5 *Bica* is a perfect illustration in which the Court recognized
6 the kind of harms when a holdover franchisee is allowed to
7 continue operation. This is exactly that kind of case.

8 The balance of the hardships. We believe that given
9 the egregious conduct of the defendants, the severity of their
10 defaults and the sheer number of their defaults and the
11 reasonableness of the non-competes, we believe that for all
12 these reasons, there is an extremely low probability that this
13 injunction would be deemed improvidently granted. And on the
14 other side of the scale, there's ample case law in which
15 courts recognize that self-inflicted harm by a holdover
16 franchisee is not something that should weigh on the former
17 franchisee's favor.

18 The public interest. Your Honor, we believe that
19 franchises such as Atlantic do a great public service in that
20 they train entrepreneurs, they develop new businesses, and
21 franchise systems such as this are particularly beneficial
22 when they operate on the premise that if individual
23 franchisees follow the system and thrive, then the whole
24 system thrives. But on the other side of the scale, the
25 public is also hurt by allowing bad actors to come into a

1 franchise system, misappropriate the value of it and use that
2 value to compete unfairly with the existing franchisees. So
3 for both of those reasons, Your Honor, we believe that the
4 public interest weighs --

5 THE COURT: Time is up. I have one question. How
6 will all of this relate to the arbitration provision in the
7 contract?

8 MS. ANDERSON: We believe that once the injunction
9 is in place, the matter could either continue to be litigated
10 here or go to arbitration. But we have every right to get an
11 injunction here, Your Honor.

12 THE COURT: That's not an issue. I understand the
13 ability to get an injunction even when there's an arbitration
14 clause. What I need to know is as a result of all this, is
15 this case going to arbitration or are you guys going to
16 litigate here?

17 MS. ANDERSON: We believe it should be litigated
18 here.

19 THE COURT: All right. We'll let Mr. Henriques
20 respond. Go ahead, sir.

21 MR. HENRIQUES: I believe it needs to go to
22 arbitration. There's a binding arbitration clause that
23 clearly --

24 THE COURT: And you can invoke it.

25 MR. HENRIQUES: So I think that's the answer.

1 THE COURT: All right. It's your turn to argue.

2 MR. HENRIQUES: All right. Thank you, Your Honor.

3 This is really a wrongful termination case and the
4 evidence that you've heard clearly establishes that this
5 fran -- these franchises were terminated for one reason,
6 because Mr. Montemurro decided he didn't want Tony Horne
7 involved in the franchise anymore.

8 I asked him at our first hearing, What was it that
9 led you to the decision to terminate in June of 2016 for the
10 very same infractions that had been going on for five years?
11 Undisputed testimony occasionally they'd miss a payment or
12 whatever. And he says, The phone call from another counsel,
13 Teddy Mathis, that stated he was naming Atlantic Pinstripe or
14 considering naming Atlantic Pinstripe in a lawsuit. That's
15 what he said.

16 I asked him again, Isn't it true you wanted Tony
17 Horne out? And on page 65 of our rough transcript, the
18 question was, "You made it clear you wanted Mr. Horne out of
19 the franchise, right?

20 "Answer: I made it clear to his partners I would
21 like to disassociate myself with everyone in that room before
22 I wound up getting named in a lawsuit and I needed to break to
23 myself and other franchises, yes, I did."

24 He wanted out.

25 What's really unique and remarkable here, Your

1 Honor, is we not only have his testimony, we have testimony
2 from the meetings with my clients where he said he wanted Tony
3 out, but we have correspondence with his lawyer which he
4 waived privilege on where they were originally working on a
5 cooperative transfer deal and his lawyer says you may have a
6 hard time getting signatures from Mr. Horne and Mr. Parker;
7 and so therefore, you don't have to worry about that if you
8 just go ahead and terminate. And I think that --

9 THE COURT: I read it.

10 MR. HENRIQUES: Huh?

11 THE COURT: I read it.

12 MR. HENRIQUES: All right. So that's the
13 separation. He says we'll just terminate and we're not going
14 to worry about it.

15 And so the question the jury is going to have to
16 decide -- or the arbitrator. We think it goes to arbitration.
17 But the ultimate question is, was the termination valid or was
18 it wrongful? And here I think on the success of the merits,
19 the clear indication is it wasn't validly terminated for any
20 of the reasons listed in that termination notice. That's why
21 I had each of my clients go through it. The only one they can
22 terminate without notice is insolvency, inability to pay debts
23 when due. There's been evidence of a couple of disputed
24 vendors that they didn't pay and one frivolous lawsuit filed
25 in South Carolina that did business with a company called

1 Partners but decided to do the kitchen sink and throw in each
2 of the three named defendants and Atlantic Pinstripe. That
3 does not provide clear evidence that there's a valid grounds
4 for termination. All the other laundry list are small
5 violations. Most of them are unexplained. And the contract
6 says for those items they have to give notice and an
7 opportunity to cure.

8 I found it interesting that in their reply brief
9 that they filed, they point out correctly, Your Honor, that
10 under North Carolina law, a written contract can be modified
11 by the course of dealings. They argue that to say, well, it
12 was modified to make the companies a party. But I agree it
13 can be modified by course of dealings. Here you've got six
14 years where something is received late, they give notice and
15 it gets fixed. They had a series of problems. They put them
16 on probation. They had 90 days to improve. They did.

17 They renewed them in 2015 after these alleged
18 incidents with Savannah, after the other incidents. There's
19 no indication of any new occurrence in 2016. The only thing
20 that changes in 2016 is he's decided -- he hears about this
21 lawsuit. He gets scared. He does an internet search and
22 finds something about Tony he doesn't like and decides I'm
23 done. That's what happened. And if the jury concludes that
24 has happened, that's a wrongful termination. There's no valid
25 basis for termination. And they have not made --

1 THE COURT: You said there won't be a jury. There
2 won't be a jury according to you.

3 MR. HENRIQUES: I'm sorry, I'm used to talking about
4 a fact -- it would be the fact finder. The arbitrator would
5 make that determination. That's really what this case is
6 about.

7 THE COURT: Quick question.

8 MR. HENRIQUES: Yes.

9 THE COURT: What's frivolous about a \$38,000
10 judgment against Mr. Montemurro?

11 MR. HENRIQUES: Thank you, Your Honor. That's a
12 different -- that's not the same Mr. Williamson. That's not
13 this case. If you look at the case caption, that -- the item
14 they've introduced is a separate rent dispute from a -- it's a
15 different party and a different case caption. So I at first
16 was confused thinking that that was in the Dentworks lawsuit,
17 but it is not. It's a separate -- it's a --

18 THE COURT: It's against Atlantic Pinstriping Triad,
19 LLC.

20 MR. HENRIQUES: It is, Your Honor.

21 THE COURT: And Tony Horne who is a defendant here.

22 MR. HENRIQUES: That's correct.

23 THE COURT: Okay. Go ahead.

24 MR. HENRIQUES: That was a -- my understanding,
25 that's a default judgment that my clients found out about for

1 the first time when they saw that notice here. They were
2 never served with process. But that's -- but more importantly
3 for Your Honor's purposes for default, that was entered on
4 August 18th so it's two months after the termination. It
5 can't serve as grounds for terminating the franchise because
6 it happened two months later.

7 THE COURT: Okay.

8 MR. HENRIQUES: But it -- I thought it was the
9 Dentworks case. That case is still going forward, the one in
10 South Carolina. So it is -- it's different.

11 But that's really what the case is about: Is the
12 termination proper or is it not? There's obviously factual
13 disputes surrounding that. But under *The Real Truth About*
14 *Obama*, which we agree is the standard. And I apologize for
15 citing *Blackwelder*. It was an older brief. I agree that's
16 not the standard.

17 What I'm not sure plaintiffs appreciate is *The Real*
18 *Truth Obama* made it clear that the bar has been raised
19 considerably by *Winter* and now, unlike in *Blackwelder*, there
20 has to be a clear showing of likelihood of success as a
21 threshold matter. And so it's not simply do they have a
22 chance of success or are there substantial questions which is
23 the old threshold. Now it's clear likelihood. They have not
24 done that.

25 The evidence from the witnesses you heard clearly

1 indicates that there was no valid basis for termination, that
2 this is a trumped up termination notice. He really wanted to
3 get rid of Tony and this was the way he was going about doing
4 it. And if that's the conclusion, then the answer is they
5 should be reinstated as franchisees. There's uncontested
6 evidence that they were among the most financially successful,
7 bringing in over a million dollars. So the idea that they're
8 somehow insolvent or having problems, it simply doesn't jive
9 with the evidence you've heard about the history and success
10 of these franchises.

11 So if the termination is wrongful, that casts the
12 whole -- the whole termination provisions into doubt and
13 there's no basis to think that a wrongful -- after a wrongful
14 termination you're going to get enforcement of the
15 non-competes or the other provisions.

16 So I think on the likelihood of success, they simply
17 have not met their burden to show they're going to prevail on
18 the contract claims.

19 I notice that they start with the intellectual
20 property claims. It's really a nonissue and I'm surprised we
21 keep arguing about it. We have not violated that patent. We
22 offered to return the applicators early on before I got
23 involved in the case. I brought them with me to court. I
24 asked him if we return it, can we get our deposit back.

25 THE COURT: The contract says you can't.

1 MR. HENRIQUES: Huh?

2 THE COURT: The contract says you can't. You don't.

3 MR. HENRIQUES: Well, the contract says that we're
4 supposed to turn it in within 14 days so --

5 THE COURT: And you haven't.

6 MR. HENRIQUES: And we didn't turn it in within 14
7 days because after he took the first one and refused to return
8 it -- a deposit within 14 days and violated the contract, our
9 guys were reasonably fearful that if we just hand over the
10 other seven, we're never going to see our security deposit
11 back.

12 THE COURT: And then you fight about that, right?

13 MR. HENRIQUES: Right. Now, I think -- you know, I
14 delivered -- I brought the equipment to plaintiffs' office. I
15 said here it is. Photograph it. Confirm we've got it. My
16 clients aren't using it. They can't. It's in my physical
17 possession. There's no issue. If your order wants to
18 enter --

19 THE COURT: Why don't you give it back to them.
20 Give them their equipment and then fight about the darn
21 deposit. Why are you all keeping their equipment?

22 MR. HENRIQUES: Well, because we're not sure we'll
23 ever see the deposit back.

24 THE COURT: That is probably subject to the issue
25 that you're going to bring up with the arbitrator, isn't it?

1 MR. HENRIQUES: Well, the arbitrator is going --
2 THE COURT: Isn't it one of the things you could
3 talk about there?

4 MR. HENRIQUES: Definitely -- both sides have claims
5 for damages the arbitrator would decide. But it seems to
6 me --

7 THE COURT: He has a patent. You guys are using it.
8 Give him his equipment back for God's sake.

9 MR. HENRIQUES: Again, I don't think that's -- and
10 obviously Your Honor can order that. We'll do that. I've got
11 the equipment so my folks aren't using it.

12 I think -- I think it's interesting that when I
13 asked him on examination, he said I'll never see that
14 equipment. I said, If we give it to you, will you give the
15 \$2,500 back, and he said yes.

16 Then his lawyer points out, well, there's 14 days
17 under the contract. It's a security deposit, Your Honor. To
18 me that's an unreasonable position to say, yeah, you gave me
19 the security deposit. I took that money, but you can't have
20 it back. Obviously Your Honor can address that however you
21 want.

22 But there's no -- there's been no evidence of
23 continued infringement. What they've tried to come up with is
24 this double hearsay affidavit of Mr. Powell. I refuted that
25 directly from my client. We're not -- we haven't copied it.

1 We're not infringing. So I think that's a non-issue. We're
2 not using their technology. We went and bought another
3 applicator. So that's not an issue and they haven't put that
4 in issue.

5 And the same thing is true with trademarks. We're
6 not using that name. We're doing Custom Dealer Services. She
7 says it doesn't matter that that's how they're now answering
8 or that's how it's being invoiced. It sure does because we
9 had said, and we said in the declaration Mr. Horne filed,
10 we're not using it. Now, they did come forward with that
11 LinkedIn page that Mr. Parker failed to switch. You heard
12 from him that he doesn't use LinkedIn and had forgotten that
13 that's listed that way and it's been fixed. I tried to find
14 this other one their investigator found. I can't find any
15 LinkedIn page for that employee so I don't know if that popped
16 up as some legacy identification.

17 But there's no evidence that we're marketing
18 ourselves as Atlantic anymore. We're not doing that. We're
19 sending invoices that are Custom Dealer Services. So I don't
20 think they've proven some irreparable harm from that
21 marketing. I listened closely for the evidence of, you know,
22 irreparable harm because that is the second requirement under
23 *Real Truth About Obama*, irreparably harmed absent preliminary
24 relief. And I listened hard. I don't see how they're being
25 irreparably harmed.

1 She said there are three reasons. One is our
2 equipment, which we're not using. There's no evidence we're
3 continuing to use it. The other is their trademark, which
4 there is no evidence that we are continuing to make use of.
5 And then she said damage to the franchise. And that's why we
6 cited in our brief cases you can -- if you're showing that
7 you're losing lots of customers and goodwill is being
8 destroyed, you may be able to show irreparable harm, but we
9 heard no evidence of any customers that were actually lost.
10 In fact, the evidence we heard here at the end is they took
11 the Florida -- Venice, Florida customer that we had been
12 serving, \$40,000 a month, and now they've taken him back we
13 think with threat of litigation. But that's a customer that
14 they have even though it's not in their territory.

15 Where is the evidence of all the damage that they
16 are suffering because we have somehow stolen or competed with
17 customers that they aren't doing? It's totally absent, zero,
18 on the evidence of lost customers.

19 And that's why I cited the case where the Court
20 actually found that it was going to enforce a non-infringement
21 restriction. I'll get Your Honor the citation in a moment
22 because I think it's an important case on the irreparable harm
23 piece, Your Honor. I think it's the *Olympus* -- yeah, the
24 *Olympus* case, you know, and *Static Control* saying that in a
25 customer case you have to show the following: Identity of

1 specific customers it has lost or will permanently lose. And
2 if it's shown, how an award of monetary damages would be
3 inadequate.

4 They haven't done either of those. If they lost
5 some business and a customer comes forward and says I've been
6 solicited or I've decided not to use Atlantic Pinstripe,
7 that's something the arbitrator can award in terms of monetary
8 damage. There's no need for any kind of preliminary
9 injunction on that. And they simply haven't met the burden
10 under *Olympus* and *Static Control* to show actual customer
11 damage. So that simply is not there.

12 I think that -- so when we look at the test, they
13 haven't shown irreparable harm. There's no damage being done.
14 And they haven't shown likelihood of success on the merits.
15 And so -- and they have high burdens under both of those under
16 *Real Truth About Obama*. So I don't think there's a basis for
17 Your Honor to enter a preliminary injunction here because the
18 harm simply has not been shown.

19 THE COURT: Okay.

20 MR. HENRIQUES: The last --

21 THE COURT: Five minutes of rebuttal.

22 MS. ANDERSON: Yes, Your Honor.

23 I'm not -- starting with the end of Mr. Henriques'
24 argument, I'm not going to go through, because you're going to
25 cut me off before I could finish, the issue of whether we've

1 met the standard under *Olympus* and *Static Control*. That's not
2 the standard we have to meet in any event. I stand by our
3 reply brief on what the appropriate standard is. It's not the
4 standard for employer/employee cases. It's the standard
5 that's applied every day in courts around the country and in
6 this jurisdiction for franchisor/franchisee cases. Two
7 independent business parties that are contracting and they
8 agree on what the relationship will be and they're held to
9 that agreement.

10 In terms of irreparable harm, I think it's ludicrous
11 to say that the things that have happened to Atlantic at the
12 hands of these defendants don't constitute irreparable harm.
13 When you've got your trade name appearing in lawsuits for
14 unpaid bills, for tax liens; when you've got people who have
15 dealt with your franchisee saying I will never deal with you
16 because I've dealt with you before, confusing them for the
17 other legitimate Atlantic Pinstriping.

18 And in terms of the wrongful termination, I do want
19 to address that because I think it's so critical. In one
20 year -- in the space of one year we provided evidence that
21 there were 48 separate defaults. Now, you could go with a no
22 good deed goes unpunished theory and say that a franchisor --
23 if a franchisor tries to work with a franchisee, then he has
24 to do that forever. That's not the law, and particularly when
25 the contract says you don't waive your right to enforce simply

1 by trying to work things out, which is what they did. But the
2 defaults got more and more serious. And they got to be things
3 such as trying to sell franchises, posing as the franchisor,
4 posing as the franchisor with a vendor. Just things that
5 involved dishonesty. Things that involved businesses calling
6 Mr. Montemurro and saying you are stiffing us and we're going
7 to bring you in because your franchisor is doing that.

8 Now, I always think of something I talk to clients
9 about which is a saying from Ambrose Bierce in The Devil's
10 Dictionary: A litigant is someone about to give up his skin
11 in hopes of keeping his bones.

12 I don't think a franchisor can disregard the fact
13 of, you know, this bad behavior that's leading to all this
14 litigation that the franchisor is being drawn into. I think
15 that's a legitimate concern, a legitimate grounds for
16 termination, particularly on top of all the others.

17 THE COURT: Okay. We'll see you folks back in here
18 in -- at 2:00.

19 (Lunch recess at 1:09 p.m.)

20 (Court back in session at 2:12 p.m.)

21 THE COURT: All right. Counsel, thank you for all
22 the good work you've done on this matter. I have read all the
23 briefs. I've heard the evidence, the oral argument, and I'm
24 prepared to make a ruling at this time subject to further
25 elaboration with written order.

1 But in order to obtain a preliminary injunction, the
2 plaintiffs must establish, one, that they're likely to succeed
3 on the merits; two, that they are likely to suffer irreparable
4 harm in the absence of preliminary relief; three, that the
5 balance of equities tips in plaintiffs' favor; and four, that
6 an injunction is in the public interest. These are
7 established after *Winter* and *The Real Truth About Obama versus*
8 *Federal Election Commission* in the Fourth Circuit.

9 First I will address the likelihood of success on
10 the merits.

11 Plaintiffs have demonstrated a history of a
12 multitude of defaults on the part of defendants under the
13 franchise agreements; specifically, evidence of 48 separate
14 defaults within a year. These defaults became increasingly
15 serious to the point of exposing plaintiffs to lawsuits due to
16 plaintiffs' bad behavior -- due to defendants' bad behavior.
17 Moreover, there is convincing evidence of the defendants'
18 failure to comply with their post-termination obligations,
19 including the obligation to return licensed property and
20 thereby a violation of valid non-compete provisions. The
21 Court finds the plaintiffs have met their burden of a clear
22 showing of a likelihood of success on the merits.

23 The Court further finds that the plaintiffs have
24 demonstrated they are likely to suffer irreparable harm due to
25 defendants' violation of their post-termination obligations.

1 Plaintiffs have presented evidence that their goodwill and
2 reputation with customers and vendors will be damaged if
3 defendants continue to violate the covenant not to compete and
4 use the intellectual property of the plaintiffs.

5 The Court also finds that the balance of harms tips
6 in plaintiffs' favor. Any alleged potential harm to
7 defendants is a result of defendants' own conduct. Such
8 self-inflicted harm is far outweighed by the damage done to
9 the plaintiffs.

10 Lastly, the issuance of a preliminary injunction
11 will serve the public interest first because it will encourage
12 franchisors like Atlantic Pinstriping, LLC, to continue to
13 invest substantial assets in providing franchisees with
14 training, skills and promotional advantages of a recognized
15 trade name which enable them to establish their own businesses
16 at reduced costs. Also, it will protect the investments
17 franchisors make in developing those systems and prohibit a
18 third party from taking advantage of the skills and goodwill
19 they were provided without paying what they agreed in
20 exchange. Moreover, there is a strong public interest in
21 honoring the sanctity of a contractual relationship.

22 The Court finds the plaintiffs have met their burden
23 for issuance of a preliminary injunction. The Court grants
24 the motion.

25 Plaintiffs are to prepare a proposed written order,

1 serve it on the defense counsel and on the Court. Counsel may
2 have one day thereafter to file written short briefs
3 addressing any proposed such written injunction. And then the
4 Court will sign an order consistent with these bench rulings
5 today.

6 And then if you are going to go forward with your
7 arbitration, you should proceed in that regard subject,
8 however, to the injunction. And then you can go -- for what
9 it's worth, I strongly urge all of you to sit down, take a
10 deep breath and see if there is some negotiated way out of
11 this morass. Even with the sums of money that have been
12 testified to, none of you can afford to litigate this thing
13 out this much, this crazy. There's just not that much money
14 involved. So you all ought to be able to sit down. You've
15 been in business. Take a good hard look at this and see how
16 to get out of this mess without spending millions in
17 attorney's fees.

18 That's the ruling of the Court today. So thank you
19 very much, counsel. I greatly appreciate the professionalism
20 that you have both -- have both exhibited in this matter. And
21 let me know what your plans are. Thank you very much.

22 MR. HENRIQUES: Your Honor, can I just for
23 clarification on arbitration, because our answer is currently
24 due on Thursday, are you indicating that you're --

25 THE COURT: If you want to file an answer, you

1 certainly may do so. If you wish to ask for an extension so
2 you can file the arbitration, have at it.

3 MR. HENRIQUES: Thank you.

4 THE COURT: Whatever you want to do in that regard,
5 just let us know.

6 (End of proceedings at 2:17 p.m.)

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF REPORTER

4
5
6 I, Cheryl A. Nuccio, Federal Official Realtime Court
7 Reporter, in and for the United States District Court for the
8 Western District of North Carolina, do hereby certify that
9 pursuant to Section 753, Title 28, United States Code, that
10 the foregoing is a true and correct transcript of the
11 stenographically reported proceedings held in the
12 above-entitled matter and that the transcript page format is
13 in conformance with the regulations of the Judicial Conference
14 of the United States.

15
16 Dated this 26th day of April 2017.
17
18

19 s/Cheryl A. Nuccio
20 _____
21 Cheryl A. Nuccio, RMR-CRR
22 Official Court Reporter
23
24
25